

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
LAND CAUSE No. 8 OF 2015

In the matter between:

MR. BEN NANKUMBA

CLAIMANT

AND

CAPE MAC LODGE & FROGGIES RESTAURANT

DEFENDANT

J U D G M E N T

nyaKaunda Kamanga, J.,

Mr. Ben Nankumba commenced this action by way of a specially endorsed writ of summons that was issued on 18th February 2015. He will be referred interchangeably as Plaintiff and Claimant. The Claimant is seeking a declaratory relief against the Defendant, that the piece of land at Cape Mac Lodge and Froggies Restaurant at Cape Maclear is customary land belonging to the Claimant. The Claimant is resident at Chembe village, Traditional Authority Nankumba in the district of Mangochi and used to occupy the beach land on which the Defendant is doing its tourism business. The pleadings also show that the Defendant is an investor company in tourism industry and operates a business, known as Cape Mac Lodge and Froggies Restaurant, in Cape Maclear on a piece of land that was formerly being used by the Claimant and members of his extended family.

The Claimant is also seeking a permanent order of injunction restraining the Defendant from selling the said piece of land, being operated under the named, Cape Mac Lodge and Froggies Restaurant at Cape Maclear in Mangochi district. Mr. Nankumba also claims outstanding rental arrears and costs of the action. On 21st February 2015 the Claimant obtained an interim order of injunction restraining the Defendant from selling the land in issue. On 14th April 2015 the court, after an *inter partes* hearing, granted an order allowing the continuation of the interim order of injunction until the disposal of the matter.

The pleadings

The statement of claim, the defence and counter claim set out the pleadings and are reproduced as follows:

The Statement of claim

1. 'The Plaintiff is an adult Malawian staying at Cape Maclear in Mangochi District.
2. The Defendant is a company involved in the management of Cape Mac Lodge and Froggies Restaurant at Cape Maclear on the land belonging to the Plaintiff.
3. The Plaintiff and the Defendant entered into a tenancy agreement for the Cape Mac Lodge and Froggies Restaurant at Cape Maclear dated 26th day of October, 2002 for a period of 20 years.
4. The Plaintiff and the Defendant agreed on a rental fee of MK10,000.00 per month and tenancy agreement terms were revised on 10th day of November, 2010, with rent fee fixed at MK30,000.00.
5. The Defendant has been defaulting in the payment of the rental fees and is in arrears for more than 4 years and he is failing to settle the arrears.
6. The Defendant is intending to sale the piece of land to a foreigner without the Plaintiff's consent when the Defendant is a tenant and not the owner of the said piece of land.

Wherefore the Plaintiffs claims:-

- a) A permanent order of injunction restraining the Defendant from selling the said piece of land being Cape Mc Lodge and Froggies Restaurant at Cape Maclear.
- b) Outstanding rental arrears to be assessed
- c) Declaration that the Plaintiff is the rightful owner of the said piece of land
- d) Cost.'

Defence and counterclaim

1. 'The Defendant makes no comment on the contents of paragraph 1 of the statement of claim.
2. Save for the allegation that the land in question belongs to the Plaintiff, the Defendant admits paragraph 2 of the statement of claim.
3. The Defendant refers to paragraphs 3 and 4 of the statement of claim and state that the said agreements either lapsed by operation of law, were overtaken by subsequent events, were varied by subsequent agreement and / or lapsed by effluxion of time, and the Plaintiff is put to strict proof thereof.

4. The Defendant denies the contents of paragraphs 5 and 6 of the statement of claim and the Plaintiff is put to strict proof thereof.
5. The Defendant avers that it is the lawful and rightful owner of the leasehold interest comprised in the land in question and the Plaintiff has no power, legal or otherwise to prevent the Defendant from enjoying its rights under the lease. The Plaintiff's claims are therefore denied and the Plaintiff is put to strict proof thereof.
6. Save as herein specifically admitted the Defendant denies each and every allegation of fact as if the same were separately set out and traversed seriatim.

Counter claim

7. The Defendant, sometime in 2002 agreed with the Plaintiffs that the land on which the Plaintiff and part of the family were living be used by the Defendant for its business and that in return the Defendant should construct houses for the Plaintiffs at another place.
8. It was further agreed that the Defendant should compensate the Plaintiffs as part of the process for lease application.
9. The Defendant did all its obligations under the agreement and the government granted the Defendant the lease.
10. On numerous occasions the Plaintiff and his family members have, despite being compensated, blocked the road to the Defendant's premises, thrown stones and other objects to the gate and roof of the Defendants property and they have threatened violence against the Defendant, its management and staff.
11. Despite the District Commissioner Mangochi and the police intervening, the Plaintiff's acts of violence against the Defendant have not stopped.
12. As a result of the foregoing, since the Defendant's land is used for hospitality business, the Defendant has lost revenue due to the Plaintiff's conduct.
13. And now the Defendant claims the following:
 - a. Damages for loss of revenue.
 - b. An order restraining the Plaintiffs from further doing the acts complained of.
 - c. An order for costs of the action.'

The Evidence

The Claimant and the Defendant called witnesses to bring out evidence in support of their pleadings, issues and particular positions.

The Claimant's case

The Claimant testified on his own behalf and called one witness, Mr. Nicco Kamanga in order to prove his claim. The first witness, PW 1, was Mr. Ben Nankumba, the Claimant himself. PW1 adopted his witness statement which he signed on 13th July 2015. From paragraphs 2 to 10 of his witness statement it is recorded as follows:

2. 'In the year 2002 the Defendant through one of its shareholders, Mr Rodger approached our family for a beach land for rent and a Tenancy agreement was prepared which was signed by the late Group Headman Chembe, T/A Nankumba, myself and Mr Rodger and the ground rent was for MK10,000.00 per month up until the construction of the Lodge was complete and after that a fresh had agreement had to be signed and the tenancy was for 20 years.
3. We were surprised in October, 2005 when the Defendant advised that he was giving us our last payment and that he had obtained a long term lease from the Malawi Government and we challenged this through the relevant channels and also through the office of the District Commissioner of Mangochi.
4. We entered into a tenancy agreement on 26th October, 200. I attach copy of the Tenancy Agreement marked "BN1"
5. The Defendant stopped paying for the rentals, as a result of this, we lodged a complaint with the office of the District Commissioner of Mangochi and the Defendants were advised that they remain tenants to us and that they should continue paying rentals as was the initial agreement as there was no evidence of sale.
6. We have never sold any piece of land to the Defendant.
7. Fresh Tenancy Agreement was made on 10th November, 2010 where the Leclercq family being the shareholder were expected to be paying the sum of MK30,000.00 per month to our family through the office of the District Commissioner and the tenancy agreement was to be valid for a period of two years and was to be varied depending on the conduct of the parties herein. I attach copy of the Agreement marked "BN2".
8. I advised the District Commissioner for Mangochi District Council to help in changing the Title Documents as the Defendant had fraudulently lased the land from the Malawi Government and the District Commissioner assured us that the process of effecting the Title change documents shall be effected once Mr Rodgers Leclercq is back to Malawi, since he had gone to Namibia where he comes from. I attach copy of correspondence from the District Commissioner for Mangochi District marked "BN3".

9. Any compensation whatsoever was made, was not in relation to any sale of the land but for the fact that the Defendant had a long term tenancy with us for about 20 years and they had to build us houses for our accommodation.
10. We recently have heard that he is intending to leave the country and is trying to sell the land to another foreigner and despite that he was only a tenant on the premises and that the only relationship with us was that of landlord and tenant.'

As part of his evidence in examination in chief, PW1, tendered documents which were poor photocopies and unreadable. Although the court questioned the witness about the whereabouts of the originals of the documents he did not respond. During cross examination Mr. Nankumba stated that he signed exhibit marked *BN2* in the presence of Traditional Authority Nankumba and the District Commissioner. Mr Nankumba denied that the land in issue was used by a number of people and that compensation in the form of building houses was only for two people while for loss of trees it was for four people. The Claimant was evasive in his testimony when he was cross examined on whether he was among the four or five people from the family who were using and staying on the land who were compensated. The Claimant however conceded that he was in court as a representative of that family. When counsel for the Defendant referred the Claimant to exhibit marked *BN1* which was also a photocopy and undecipherable, the Claimant stated that he could not see/read it properly but that it was a rental agreement. The legal practitioner for the Claimant intervened and conceded that they did not have the original document.

The Claimant stated that the letter did not mention K10,000.00 but they agreed on K10,000.00 in another agreement. The lawyer for the Claimant then stated that they would call another undisclosed witness to tender the document referred to which was not even in the list of documents. The court finds that the manner in which the Claimant's case was managed, left a lot to be desired. It was clearly un-procedural for the Claimant to still be crafting his claim, hunting for witnesses and documents after trial had commenced, when the procedure places a clear time limit within the trial bundle must be filed and served before the trial begins.

The Claimant stated that he worked with the Defendant at the start of the project, in the year around 2005 as a cleaner for a period of one year. During that time lands officials used to visit the premises. That the Defendant was given beach land and when he found it small he approached people for more land. The Claimant stated that there was a distance of about 150 metres between his house and the lodge.

He also stated that when signing BN 2 the Claimant's family complained to the District Commissioner that K10,000.00 was little and that it should be raised to K30,000.00. The Claimant stated that he knew what refraining meant and that they stopped disturbing the Defendant.

The Claimant stated that the other people mentioned in the letters were his relations who were behind this civil action. The Claimant also acknowledged receiving the sum of K10,000.00 for the trees which were on the land and that K80,000.00 was given for the damage caused to a house and that some people were relocated and had houses built for them elsewhere.

The witness conceded that staff from the District Commissioner came to the premises and charged the price for the trees and that surveyors also came and installed beacons. When he was questioned by the legal practitioner for the Defendant about how he knew that the lands officials had come by, he was evasive in his response and made attempts to change his statement that he knew that officials from lands visited the area. He narrated in this manner:

“I just knew, I asked them what they wanted, since they called me. We did not have a good discussion, then I went home”

The Claimant stated that the rental letters was his evidence in support of his statement in paragraph 5. The Claimant stated that he signed some of the documents while other people also signed. However he did not come out clear on whether he understood the contents of the agreement such as the requirement that the Defendant pay gratuitously an amount of K30,000.00. The Claimant also conceded that Leclercq owns Cape Mac Lodge and the structures which were built there.

When the legal practitioner for the Defendant asked the witness to read BN 3, the letter from the District Commissioner and state whom it mentions as the owner of the land. The Claimant responded from his own head that the letter stated that he was the owner of the land. When cross examined on whether that statement is what appeared in the last paragraph he responded that the “letter says Leclercq”.

This equivocal type of response from the Claimant and his evasive demeanour convinced this court that Mr Ben Nankumba was a very difficult witness who avoided providing truthful answers to simple questions and had no intention at all to assist the court in arriving at the truth.

In re-examination the Claimant stated that they wanted a new rental agreement of K30,000.00 a month. The second agreement was not signed as the Defendant had indicated that he had bought the land.

The second witness for the Claimant, PW2, was Mr Nicco Kamanga. He also adopted his witness statement which is reproduced below from paragraphs 2 to 19:-

2. 'I remember it was in the year of 2002 when Mr Rodger came to our place and asked for a piece of land to rent.
3. At first we denied him but kept on coming for three times and during the fourth time we accepted him to have our land for rent.
4. But before that we took him to the late Group village Headman Chembe where a land rentals agreement was signed and from there we took him together with the late Chief Chembe to the T/A Nankumba where also the T/A signed for the document and on our part Mr Ben Nankumba signed on our behalf. I attach a copy of the tenancy agreement marked 'NK 1'.
5. It was further agreed that the tenant shall be paying MK10,000.00 being rentals per month during the period of construction of the lodge and the same to be reviewed on completion of the lodge.
6. In October, 2005 we were surprised to hear that he was going to give us our last payment because he had bought the land from the Malawi government.
7. We went to the district Commissioner of Mangochi District to find out what had happened and we did not get any convincing explanation and only to be shouted at by a Mr Kachingwe and a lady who had signed for the lease documents in place of the District Commissioner.
8. We were told to go and meet T/A Nankumba and the T/A told us to go and meet our Group Village Headman.
9. We went to meet the Group Village Headman that was in January 2006 but he only kept on advising us that we should just wait but after pressuring him he started threatening us with evictions.
10. In August, 2006 I went to the Department of Lands and valuation in Blantyre where I got the document of the said Lease. I photocopied the document and took it to Mangochi DC's office where I met a Mr Shaibu who called the T/A Nankumba and after discussing for a long time he admitted that the leasing process was wrongly done and he advised the T/A to have a meeting with us, Rodger, Group Village Headman Chembe, the representative of the late Chief Chembe to discuss and come up with the way forward.
11. A meeting was called but to our surprise the Group Village Headman Chembe didn't attend the meeting, and he only sent his sister to represent him and at this meeting also, nothing tangible came out.
12. We have never sold any piece of land to the Defendant.
13. Fresh tenancy agreement was made on 10th November, 2010 where the Leclercq family being the shareholder were expected to be paying the sum of MK30,000.00 per month to our family through the office of the district commissioner and the tenancy agreement was to be valid for a period of two years and was to be varied depending on the conduct of the parties herein. I attach copy of the Agreement marked 'BN2'.

14. I advised the District Commissioner for Mangochi District Council to help in changing the Title Documents as the Defendant had fraudulently leased the land from the Malawi Government and the District Commissioner assured us that the process of effecting the Title change documents shall be effected once Mr Rodgers Leclercq is back to Malawi, since he had gone to Namibia where he comes from. I attach copy of correspondence from the District Commissioner for Mangochi District marked 'BN3'.
15. Any compensation whatsoever was made, was not in relation to any sale of land but for the fact that the Defendant had a long term tenancy with us for about 20 years and they had to build us houses for our accommodation.
16. We recently have heard that he is intending to leave the country and is trying to sell the land to another foreigner and despite that he was only a tenant on the premises and that the only relationship with us was that of landlord and tenant.
17. The Defendant stopped paying rentals alleging that he had leased the land from the Government, yet we never sold any interests in the said customary land to anybody else.
18. We never disposed of any interest in the said land through sale but only through a tenancy agreement.
19. In conclusion therefore I am convinced that the lease to the Defendant was not properly granted by the Government as there was no consent from the family members.'

Mr. Kamanga tendered in evidence a document, which was received and marked exhibit BN 1. The witness stated that exhibit marked BN 1 shows that Leclercq and Nankumba agreed on a 20 years lease. The court noted that this was the same document that the Mr. Ben Nankumba, the PW1, had also tendered and was received as exhibit marked BN1. In regard to the readability of BN1 the court already noted that it was a poor photocopy and unreadable. Once again, the counsel for the Claimant conceded that it was difficult to find the original document and that the Claimant only had copies. Other photocopied documents which PW2 tendered in court were exhibit marked BN 2 and exhibit marked BN3.

The witness informed the court that this case has gone to so many venues for discussion and what he wished to add was that in 2016 because of the disagreements, the District Commissioner Chirwa called for a meeting where a lawyer and the witness himself were present and ordered rental arrears of K35,000.00. A new rental agreement was made and K90,000.00 was given to the District Commissioner. According to this witness, there was no sale agreement for the place.

In cross examination Mr Kamanga, PW2, conceded that he came from Thyolo and that he was only attached to the Nankumba family by virtue of

marriage. Although there was no blood connection he insisted that he was connected to the Nankumba family by marriage. The witness gave his educational background and career history as requested by the Defence counsel. He admitted that he spoke English better than Ben Nankumba and that Ben Nankumba does not know English. The witness stated that Ben Nankumba and himself had been representing the family.

The witness conceded that none of the agreements were signed by him because he was in Blantyre and that he was not head of the Nankumba family. He insisted that no matter what happened, Nankumba would sign as head of the clan. Mr Kamanga stated that BN1 was entered into freely and that it was a rent agreement between Nankumba and Leclercq family. However, he failed to pinpoint where those terms were written on the document although he said he was able to read. When he was shown document marked 'Id 1' and after he had read it, he stated that he was not interested in it as it was not part of his evidence which was contained in exhibit marked 'BN1'. He conceded that 20 years was mentioned in the exhibit but not the sum of K10,000.00. The witness stated that he knew of the law relating to land in Malawi and that customary land belongs to the people. The court noted that this legal question was of course inappropriate for a local witness who was only supposed to testify on factual issues and did not present himself as a legal expert.

The witness stated that the Defendant did not threaten them, they asked freely for rent and they gave them a place for rent. The witness mentioned that in a previous case *'they'* sued the Ministry of Lands, but the government was not a party to the present case. PW2 did not come out clearly in regard to the persons who fell under the plural pronoun *'they'*. The court notes from document marked *Id 2* that civil action Civil Cause no. 2829 of 2006 was commenced in the name of one Claimant, similar to the present civil matter. Therefore the use of plural pronoun required some clarity. PW2 stated that the case which he was referring to was withdrawn at High Court because *'they'* met with the officials from Tourism, Home Affairs and District Commissioner and *'they'* agreed to be given rental arrears. The witness was shown and asked to read document marked '*Id 2*', which was later tendered in evidence by the defence and marked exhibit 'JL 12'. *Id2* shows that the High Court case which PW2 referred was not withdrawn but was dismissed for want of prosecution. This document which is marked exhibit JL12 clearly shows that Mr. Nicco Kamanga, who was the Plaintiff in Civil Cause no. 2829 of 2006, as a witness in the present civil action was not truthful in his testimony and told lies to the court about the outcome of the previous civil case that he had referred to. In any event PW2 failed to prove his allegations that the High Court case that he had referred to was withdrawn on condition that rent arrears would be paid. When the witness read the document marked exhibit BN 2, there was indeed no mention of rent. When PW2 was cross examined on whether the term gratuity meant rent to him, his response was that:

“I do not know the English that they use but it is rent”.

PW2 having early on informed the court that he knew English putting forward the above response as the meaning of gratuity augments the opinion of this court that Mr. Kamanga was not keen on telling this court the truth on the issues in this case. One way that PW2 evaded correctly answering the question was to pretend that he did not know the English term that was used but that to him that term meant rent. The witness stated that the Nankumba family, the Traditional Authority and the District Commissioner were there at the meeting but he was not present. Mr Kamanga stated that *‘they’* went to complain to the District Commissioner because *‘they’* wanted outstanding rentals. *‘They’* also wanted the DC to explain how the lease was obtained without consent of the owners of the land. *‘They’* wanted the lease to be removed and the land returned to its owners. Since he was not present at the meeting PW2 was not competent as a witness to inform the court what transpired and whatever he told the court in respect of that meeting was hearsay and inadmissible. The witness alleged but did not prove that Leclercq obtained the lease dubiously from the corrupt villagers who consented.

The witness explained that the compensation stated in paragraph 15 of his witness statement was wrongly framed as it should have referred to other people who were affected by the brick works and not the family. When further cross examined on whose accommodation he was referring to, the witness lost his self-control and shouted out the following words:

“wrongly framed ---- the place is for a lot of people, a whole clan. This was wrongly framed by the writer”.

When further cross examined on why he proceeded to sign the statement his response was that:

“I did not note the mistake”

When asked if the witness had evidence that the Defendant to intends to leave the country, the response of the witness was that rumours are rife and that he stopped paying rent.

“ What is happening there shows that he intends to sell property, we are Malawians and they are foreigners and they can do what they want, but whether they go ...we want our land back”.

The witness also stated that there are several court cases against the Defendant.

The evidence from the Claimant’s witnesses seems to clearly show that there were tensions between the Claimant and the Defendant. Although PW2 claimed that there were no grudges and that he just wanted justice to be done, the same was not supported by the angry tone with which he responded in cross examination. Further, PW2 openly stated xenophobic remarks towards the

shareholders of Defendant. Such xenophobic attitude might also explain the violent manner of PW1 towards the Defendant.

In re-examination the witness alleged that the case 'they' had against Ministry of Lands was not properly handled by undisclosed lawyers. PW2 also alleged that although 'their' file was returned to them, the copy of the document which was shown to him was not in the file. This court found these remarks from PW2 an after-thought and another regrettable effort to tell more lies on the issue. Apart from his poor demeanour what worsened the credibility of the witness was his incredible effort to clarify paragraph 15 of his witness statement. It was unbelievable that PW2 informed the court that the compensation was given to some nameless person and another nameless woman, who agreed to be relocated to some disclosed place when he earlier on informed the court that he was connected to the Nankumba family and he knew everything that was going on in regard to the land in issue. Yet PW1, DW1 and DW3 were able to name the persons who benefited under the compensation arrangement.

After this witness, the Claimant's lawyer made another application to bring another witness when a witness statement had not even been filed. The Claimant stated that he wanted an additional witness to address the issues raised in exhibit marked *BN3*. The court granted an opportunity to both parties to file and serve amended documents or fresh witness statements.

On 2nd March 2016, the Claimant through Messrs G. Nankhuni & Partners filed a notice of change of legal practitioners after the Claimant had appointed them to act on his behalf instead of Messrs Gondwe & Attorneys who previously represented him. On 1st December 2016 the Claimant through his lawyers filed a summons for an order to transfer proceedings to the Zomba Registry. The Claimant's reasons for the sought transfer was that both the Defendant and himself 'live at Chembe Village, Traditional Authority Nankhumba, Mangochi' and that 'it is definitely expensive for both myself and the Defendant in Mangochi to be litigating in Blantyre when there is a convenient forum being the High Court, Zomba District Registry'. On 16th March 2017 the court after hearing from both parties on the application for an order to transfer proceedings it declined the summons and dismissed it for lack of merits. The main reasons noted by the court were that: first, the matter was partly heard and it was adjourned upon request of the Claimant so that he could file additional witness statements. The Claimant having failed to file the additional documents it was an abuse of the process of the court to then approach the same court seeking transfer of the proceedings. Secondly, the Claimant had already testified and being legally represented he did not have to attend court for the rest of the proceedings, accordingly the issue of expenses on his part was a lame excuse. Thirdly, the summons was a mere delay tactic as it was the Claimant himself who, despite knowing the physical residence of himself and that of the Defendant, elected to bypass the Zomba District Registry and commence the action at the Principal Registry in Blantyre.

The Claimant through his newly appointed lawyers also applied for leave to amend the statement of claim, file and serve supplementary list of documents and file and serve supplementary witness statement. These applications were also dismissed in their entirety on the ground that the Court had already granted such relief to the Claimant a year earlier. However for the reasons that were best known to the Claimant he failed to act on the order of the court for over one year. It was therefore an abuse of the process of the court for the Claimant seeks a relief from the court then fail to act on it for over a year and approach the court again for the same relief: *Kasungu Flue Cured Tobacco Authority v Zgambo* [1992] 15 MLR 174. Obviously, while the application for transfer was really intended at forum shopping, the two applications to amend the pleadings and bring further evidence and documents were merely meant to recraft the Claimant's action after the gruelling cross examination of the two witnesses as well as being a step intended at delaying the proceedings and the defence case. The applications having been denied the Claimant then proceeded to close his case.

The Defence Case

The first defence witness, DW1, was Mr Promise Sambala. Promise Sambala is a businessman who is resident in Chirimba, Blantyre. He adopted his witness statement which is reproduced below and tendered in evidence two documents that were marked exhibits *PS1* and *PS2*. The said witness statement reads as follows, from paragraphs 2 to 21:

2. 'I have known Mr and Mrs Leclercq the shareholders on the Defendant Company from 2001 when they had just arrived in Malawi from Namibia. I knew them through my Indian friend Jay Prakesh who was in Malawi then. When he was approached by the Leclercqs with the story that they were looking for a piece of land on which to put up a lodge, he referred them to me to help them.
3. From then we have worked and walked together and that all the transactions to the land in question are well known to me. All the transactions were done in my presence and I acted as the Leclercqs' interpreter as not every person we dealt with could understand English and they too could not understand the vernacular language.
4. When the Leclercqs were introduced to me, we left Blantyre for Mangochi to start looking for the land they were looking for. We met residents of Cape Maclear who helped us to look for the land. They took us to Mr Ben Nankumba and his family.
5. Negotiations ensued in respect of the land occupied by the Plaintiff and some of his family members.
6. When we reached an agreement we went to Village Headman Chembe who had no problem with the arrangement. That the Defendant could operate his lodge on the land occupied by the Plaintiff and his family members.

7. A written agreement was signed in which the Defendant would be using the land at a fee for 20 years but the rental payable had not been agreed.
8. When the Defendant felt the period in the agreed tenancy was short considering the nature of the investment they wanted to put up, the Defendant took advantage of their negotiations with the Plaintiffs on rentals also to negotiate the duration of the lease.
9. The Plaintiff and his family agreed to extending the duration to 99 years. It was me who drew up the 99 years tenancy agreement and it was in my handwriting and the rentals were fixed at K10,000.00 per month. This agreement was signed by Mr Rodger Leclercq and myself on behalf of the Defendant and by Mr Grayson Nankumba a brother to the Plaintiff. It was witnessed by the Village Headman Chembe and his secretary. They appended the Village Headmans stamp to the agreement. I exhibit this agreement marked as PS 1.
10. Based on the contents of the agreement marked PS1, Mr and Mrs. Leclercq asked their lawyers from Namibia to prepare a proper lease document. The same was also executed by the parties. For the Defendant it was Mr Leclercq and myself who signed and for the Nankumba family it was Mr Ben Nankumba and Loidi Imani who signed the document. The document is exhibited marked **PS 2**.
11. The Leclercqs asked me to ask the Plaintiff and his family if we could register the lease for purposes of preserving evidence and for it to carry better legal recognition. The Plaintiff accepted.
12. When Mr and Mrs Leclercq and I went to the office of the District Commissioner in Mangochi where we were told that those leases were not legal and of no effect. We could not register them. They said it was only the government who could grant such leases as all land in Malawi belongs to the government.
13. They advised us that to get government lease the first thing was that the person who had the right of use of the land must be willing to surrender his right and the village headman, followed by the chief of the area, are supposed to sanction such arrangement. When the same has been done, an application has to be lodged through the District Commissioner whose office will subject the application to scrutiny by the office and the Lake Committee. After the application passes this stage, the application is passed on to the office of the Regional Commissioner for Lands. The land is surveyed and the District Commissioner evaluates all the property on the land to determine the amount of compensation to be given to the people who were on the land. When such compensation is paid and received, there is surrender of the right of use of that land.
14. The above was communicated to the Plaintiff who had no problems with this arrangement and we then went to collect the lease application forms

and the Village Headman signed them. The Chief Nankumba also signed them.

15. The land turned out to be too close to the lake. When the government surveyors had come to survey the land, they advised us that we could not erect any buildings within 35 meters from the lake. This meant that the land remaining was reduced if we took out the distance from the lake that the authorities advised could not be used to build structures. The Plaintiff then gave advanced to the Defendants extra land beyond the earlier boundaries so that their plan could fit on the ground. The surveyors then went ahead with the survey and all this was done with the full knowledge of the parties that it was for the purposes of getting a lease. This was happening in my presence and that of the Plaintiff.
16. The DC's Officers visited the place and made their assessments and evaluations with the help of the Plaintiff and all those involved and the Plaintiff did not object to the process because he knew he was willing to surrender his right of use of the land. When the assessment was done, the Defendants were asked to construct houses for the Plaintiff and other residents as part of the compensation and to pay the concerned people money for their trees on the land. I refer copies of valuation for compensation, general receipt and copies of letters for house reallocation in the statement of Josiane Leclercq marked "JL5", "JL 6", "JL7". I add that it was as a result of the second advancement of land that people's houses were affected. Initially the land did not affect people's houses.
17. That after the Defendant had satisfied all requirements for lease application, they were granted "offer of a lease" on the 11th day of August 2005 and the lease was subsequently granted.
18. When the lease had been granted, I and the Defendants lost touch for some time until later when I was called to attend a meeting following the problems that the Defendants were facing. The meeting was patronized by the District Commissioner and officials from the Ministry of Tourism.
19. At this meeting I learnt of the Plaintiff and his family members blocking the road to the lodge, stoning the gate and roof of the lodge, loud noises that scare customers.
20. As a compromise, the Defendants agreed to be paying gratuity to the Defendants in the sums of K30,000.00 per month for 2 years after which depending on the conduct of the parties the agreement would be reviewed. The two years elapsed long time ago.
21. Therefore I am aware that the lease process was done openly with the full knowledge of the Nankumba family and following the process advised by the DC's Office. The Plaintiff having surrendered his right of use to the Defendant and having received their compensation cannot claim anything from the Defendants.'

In cross examination Mr. Promise Sambala stated that the negotiations referred to in paragraph 5 of his witness statement and in PS1 were about obtaining land to rent and not take it away from the Claimant. That prior to this there was an agreement to change rentals from 20 years to 99 years as the boss felt 20 years was too short. It was the evidence of DW1 that a document which was marked PS1 was prepared and presented to the Claimant's family and that Mr Grayson Nankumba signed on behalf of the Claimant's family. DW1 was clear that the name Grayson Nankumba was put across by the family, the land owners. When the legal practitioner for the Claimant put it the witness that there was no person known as Grayson Nankumba but that there is Grayson Abele, the witness was of the view that he must have been misled by the family. DW1 stated that at the time the document was being executed they were dealing with two people and either one of them could have signed the document. That the document was taken to village Headman Chembe and the representatives of the Nankumba family were present. The witness saw Village Headman Chembe signing the document as well as the Secretary. After this process the document was taken to Namibia where lawyers prepared another document which was taken to the family. The document was given to the members of the Claimant's family to read and somebody translated for them. DW1 stated that in the exhibit marked PS2, DW1 signed as a witness and Ben Nankumba signed for the family. That PS2 was an agreement between the two parties creating a lease for 99 years at K10,00.00 per month. It was signed on 31st July 2003. At that time the defendant had not yet started developing the land. As the Defendant negotiated for more pieces of land the DC was involved and agreed that there should be compensation for the loss of trees and that other people must be relocated and built houses.

DW 1 confirmed that the document marked PS 1 and exhibit marked PS 2 were taken for registration at the Registrar General's office where they were declined and taken back to the DC who advised them on the process to acquire land. They were told that the agreement was not effective so they needed a lease in the Defendant's name. DW1 stated that the procedure was described as to negotiate with members of the family, the chief, Traditional Authority (T/A) and the District Commissioner. According to DW1 the people who were consulted were the Nankumba family, who included Ben and his brothers.

When questioned if there was evidence that the Nankumba family handed over a piece of land to Froggies Restaurant, DW 1 stated that there was no document as the second document was a lease as required by government. This information was taken back to the village and they agreed. DW 1 stated that it was explained to the family by the DC that the effect of the lease was that they would not collect rentals anymore. The witness did not know whether they accepted or not as it was the duty of the DC's office.

DW1 referred to paragraph 13 and confirmed that the Claimant surrendered his right and that the Defendant could construct and the District Commissioner

(DC) also explained to them the process. In addition the Ministry of Lands confirmed that the Defendant be given two portions as they could not build a distant from the lake. DW 1 confirmed that with the new government lease the family would stop getting monthly rentals. According to the witness, the DC explained everything to the family. For Cape Mac Lodge to acquire a lease there was compensation for the trees that were affected and some people were relocated.

DW 1 stated that officials from the DC's office communicated to the villagers in his presence and they had no problems with the process. That is why the construction started. DW 1 also confirmed that Ben Nankumba gave the Defendant extra land and that in exchange for that some houses would be built to replace those which were already there. According to this witness, it was the duty of the District Commissioner to explain the implications of what the Defendant was doing by leasing the land.

In regard to his statements that there was a visit to the DC's office, the witness stated that this was confirmed by the fact that the District Commissioner valued and assessed the houses to be removed and the owners went to the DC to collect money for trees. He stated that houses that were demolished were built. DW 1 was clear in his testimony that during the transactions for the lease, there was always Mr Ben, his brother and the witnesses' boss presented the documents.

When referred to document marked JL4 (RL4), the witness stated that a couple of documents were taken to the Chief for signing and this might have been part of them as it is a long time ago. However, the witness could not recall if he was there when Chief Chembe and T/A Nankumba were signing. DW 1 stated that he was convinced that the process was followed because when the DC went to do the assessment they briefed the family and the witness. Then Leclercq went to make the final compensation and the villagers accepted the money. The witness was surprised when the lawyer for the Claimant to put it to him that Ben Nankumba was not present when lease forms were taken to Village Headman Chembe and T/A Nankumba for signing. According to DW1 the District Commissioner did the assessment and everything was done and signed by Village Headman Chembe and T/A Nankumba. Otherwise the witness also in his bewildered state wondered about who collected the money if the Claimant was not there. However, DW1 insisted that that there was no fraud as all processes were followed.

In re-examination DW1 stated that the name Greyson Nankumba was written by him on exhibit marked PS 1 and that Mr Greyson Nankumba signed against it. According to DW1, the signatory himself informed the witness that his name was Grayson Nankumba. The witness reinstated that Ben Nankumba signed the document that is marked exhibit PS2 on behalf of the family. According to DW1 in both documents marked PS1 and PS2, the rentals were

K10,000.00 every month. That the lease in PS1 and PS2 were for 99 years. The witness stated that apart from the signature of Village Headman Chembe there is also his stamp on the documents.

The witness reaffirmed that the Ministry of Lands informed the Defendant that they could not build at a distance of some 35 metres before the lake. As such the remaining land was squeezed in size and the project design could not fit on it so they sought additional land.

DW1 reconfirmed that the lease agreement was taken to the Registrar of Companies in Blantyre so that it could carry recognition. On the issue of the alleged fraud the witness confirmed that the people were aware of the processes to acquire land. According to the witness the project could not have started without a survey and the District Commissioner evaluating the place and the Leclercq doing the payment. The witness made it clear that the Claimant was on the ground during all these processes and that the Claimant was aware of what was going on. The witness stated that the District Commissioner was involved at the stage when the rejected lease was taken to their office. From the documents and negotiations it was agreed that the land will be surrendered for 99 years for construction of a lodge called Cape Mac. That exhibits marked PS 1 and PS 2 confirms that the Claimant surrendered use of the land for 99 years. The witness confirmed that in his evidence he mentioned that the District Commissioner had a duty and he could confirm that this was carried out as they came to visit the land in his presence. The witness also confirmed that before processing documents the District Commissioner checked the land and assessed it, as well as the trees and directed the relocation.

The second defence witness, DW 2, was Mr Welemu Luciano Masina, the current Traditional Authority Nankumba. DW 2 adopted his witness statement which is reproduced below from paragraphs 2 to 19:

2. 'As a Traditional Authority, my duties are to preside over installation of village headmen, Group Village headmen, resolution of disputes and preservation of peace and order in my area, disciplining village headmen, promoting government developments and distribution of land to people and dealing with land disputes. We also determine village boundaries. We also do any other duties that the government or government departments or any organizations would demand of us so long as the same is lawful.
3. I recall when I had just been installed as Traditional Authority early 2003, the lands department officials found me and asked me to accompany them on a tour along the lake shore where they were inspecting developments thereon. Mr Kwame Ngwira was one of them.
4. One of the lodges we visited was Cape Mac Lodge which was then under construction. I noted there were permanent structures being built thereon. After their inspection we left their place.

5. All along, I had known in the area there was a Mr Nankumba since he originated from a Nankumba related with the ancestors of the Nankumbas from where the name of my chieftaincy comes.
6. When I went to Chembe Village on the this day I met the said Ben Nankumba who was then working on the same project we had inspected, belonging to the Defendant .
7. Later, around July 2003 I received forms from Village Headman Chembe and Mr and Mrs Leclercq in which the latter family was applying for a lease from the Malawi Government of the same land they had already started developing. I noted Village Headman Chembe had already signed them to show that he had no obligation to the granting of the lease. This Village Headman Chembe died and the incumbent was installed on 25th September, 2005 by me.
8. The procedure when one wants to apply for a lease is that the one applying must be in occupation of the land or has use of the land. He must have some connection or right to the land. The circumstances of the person being so in occupation or having such connection or right to the land is left in the hands of the village in which the land is situated. Otherwise no one could ever be occupying land or to be using land without the knowledge and authority of the concerned Village Headman.
9. When the Village Headman is approached about the intention to have the land lease the Village Headman must be satisfied that the land is not subject to any dispute and that in the case of an application by people or companies who are not originally from that village, there is proper agreement between the original user of the land and the new user who is now applying for the lease.
10. All the Village Headmen under authority are aware of this fact and I always emphasize it because many applications I receive relating to land along the lake shore and the disputes that come involving lakeshore land.
11. When the Village Headman is convinced with the above factors, he signs the forms that are collected from the District Commissioner Office to signify no objection to the land being leased.
12. When the Village Headman signs the document it is sent to me for my signature if I also have no objection to the land being leased.
13. In this particular case, when I noted that the Village Headman Chembe had signed in agreement with the lease application, I verified with him if indeed he had followed the right procedures and when he confirmed. I also appended my signature to the form. I exhibit the form marked NANKUMBA 1.
14. When both the Village Headman and I have signed the form aforesaid the same is sent to the District Commissioners Office for their further processing. At that stage, before they can do anything the District Commissioner send his team to visit the land in question to assess the land

and any implications of granting the lease. This can be done in my absence but certainly in the presence of the Village Headman or is at least alerted.

15. I am aware that the Mangochi District Commissioner's team went to the Chembe Village and made assessments and found that there were compensations to be made to the original users of the land. I am also aware that the Defendants complied with the assessment valuations made by the said team.
16. I am aware that the lease was subsequently granted. I did not receive anything as a thank you or as a bribe for the signing of the lease application form and I am aware that the process was done openly as the Plaintiff was one of the beneficiaries of the assessment by the team. I must say and emphasize that the moment the concerned Village Headman has no objection I rarely have anything to say because the Village Headman is the one who has more knowledge and control over the circumstances of the applicants' occupation of the land. Moreover when the lease was being applied for I had already been to the place and had already known that the Defendant was already in occupation of the land and was developing the land. I could not have any reason to object to the application.
17. After the lease was granted I have been once called by the management of the Defendant and letters were also written to the Village Headman Chembe to complain about the conduct of the Plaintiff and his family members. At one time they asked me to spend a night at the lodge to appreciate their problems as complained of and what I observed was that there was very loud noise from the Plaintiff's compound where they were running a bar and the music was just too loud that it really disturbed everyone at the Defendant's lodge. Everyone was complaining about it but it played all night long.
18. I am also aware that there have been acts of violence against the Defendant and its employees and management, blocking the access road to the lodge and the Defendants have ever complained to me about it. Once I have attended a meeting where we were trying to resolve the disputes between the defendant and the Plaintiff's family, in the presence of the District Commissioner for Mangochi, Thomas Chirwa. The problems are refusing to die.
19. In conclusion therefore, I am convinced that the lease to the Defendant was properly granted by the government with the full knowledge of the Plaintiffs and his family members and that therefore the acts of violence against the Defendants are unlawful and unwarranted.'

During examination in chief the witness produced a document which was a lease application form. It was a copy and the original was not produced as it was stated to be at the Lands Department. This document was exhibit marked NANKUMBA 1. DW 2 also stated that the Claimant was disputing the fact that

he is not aware that the land is in government hands. The witness stated that the Claimant was the son of the late Nankumba and DW2's relation as *chidzukululu*. The witness explained that the land in issue used to belong to the Claimant's family before Cape Mac Lodge was built on it. The witness confirmed that as a traditional authority he is involved in the issue of giving consent when applying for government lease in the area. According to DW 2 the process is that, since the land belongs to the people in the village it is up to the owner to agree with the proposers. DW2 stated that it is the Village Headman who knows the owners and is the first to know about the application for change of ownership. According to DW2, the T/A comes after the Village Headman, who happens to be eyes that watches over the area. In the words of DW2 whatever the Village Headman approves the T/A after inspecting the area will agree with it too. The matter is then referred to the District Commissioner. DW 2 confirmed that in this case the procedure was followed as the Village Headman signed, the T/A signed and the District Commissioner also signed it.

DW 2 was not sure why the Claimant was disputing the acquisition of the land as the Village Headman knew about what was happening in his area. The witness stated that the documents for lease of Cape Mac were brought to him by the owner and another person from the village who was representing the clan and not Ben Nankumba. The witness proceeded on the understanding that they had agreed on the change of ownership of land. The witness did not know who this clan member was. DW2 stated that he was not present when Village Headman Chembe signed the application form. However DW2 verified with the Village Headman as the first point of call and the Village Headman confirmed to have signed.

The witness also stated that at one time the Commissioner for Lands, Mr Ngwira and himself visited all cottages in the area including Cape Mac Lodge. The witness stated that they found Ben Nankumba at the lodge during an inspection visit. The witness mentioned that he did not have the opportunity to consult Ben Nankumba or his family if he had given his land to Cape Mac Lodge because Ben Nankumba was working at the Lodge and the appropriate person to ask him was the Village Headman.

According to the witness the one who leases is the one who seeks for the property as he wants to have ownership. In terms of the nature of the compensation, the witness stated that it's the village headman who would know, as he meets the representatives of both sides. The witness confirmed that he did not see a letter that the clan had given land to Cape Mac Lodge as the Village Headman is the one who is in control. In regard to Ben Nankumba renting the place to Cape Mac Lodge, the witness stated that he became aware of this through a recent dispute. The witness narrated that at the beginning of his Chieftaincy he did not know of old issues but after a 'fight' broke out they went to the District Commissioner. The witness mentioned that he was not aware of the initial

agreement of 20 years. When referred to BN 1, which was tendered in evidence by PW 1 the witness stated that he did not recognise it. In regard to exhibit marked RL 1, Annexure A, the witness also said he was not the one who referred to it. It was the evidence of the witness that he was not aware of the rental agreements set up by Ben Nankumba of 20 years and 99 years. This is because during the first agreement he was not yet a T/A and in respect of the second agreement he visited the place with the District Commissioner.

The witness confirmed that he signed the consultation of chiefs form that accompanied the lease after the Village Headman had passed it on to him. When the witness was shown the last page of the witness statement where he signed he stated that on the document on consultation with chiefs there was a symbol, stamp of his office and he wrote Chief Nankumba but he did not sign. When cross examined on the allegations that the present Group Village Headman Chembe had written a letter that the procedure was not followed, the response of the witness was that the place is close to the old Chembe's place and not the new Group Village Headman. However he said that if it was the old Chembe then it would be correct. When the legal practitioner for the Claimant put it to the witness that the owners, the Claimant Mr. Ben Nankumba and family were not consulted but the lease still went ahead the response of the witness was that:

“We are hearing that today but Cape Mac Lodge came along time ago, and he also works there”.

According to the witness at the time of processing the lease Cape Mac was not operational but under construction. The witness stated that when constructing Cape Mac Lodge the lease was not done but the village headman would know better. The witness also mentioned that he was not aware of the payment of rentals to the Nankumba family. When referred to paragraph 15 of his witness statement and asked on the compensation made to the owners to leave the land, DW 2 stated that it seemed that they had built houses for them as they were relocated in order for Cape Mac to operate. When the lawyer for the Claimant sneered that it was “mere replacement of two houses” the response of the T/A was that:

“It was up to them and the village headman to agree on the compensation.”

The witness reported that he heard that they had built iron – roofed houses for them. This report was of course hearsay and this court will disregard it. On the issue of trees the witness stated that he knew nothing but the village headman of the area would be in a better position. The witness confirmed that when a dispute arose he was invited together with the District Commissioner to discuss why the Claimant was still claiming rentals on the property. The witness said he used to stay far away so he did not know if rentals were paid but the village headman would be in a better position to know. DW2 was also not aware if rental arrears

were settled. On the allegation that production of lease was not honestly done, the witness stated that he was not in a position to state anything as he looks after the Village Headman, and if the village head signs the lease he also counter signs. DW2 noted that a long time had lapsed and that structures were constructed. The witness expressed ignorance on the Claimant's assertion that when the issue went to the District Commissioner, on the reversal of the lease it was allegedly explained that the issue would be tackled when the owner of Cape Mac Lodge was back in the country.

In re-examination the witness reinstated that he was not aware of the document which was shown to him in cross examination, RL1 Annexure A, as his signature was not there, but there was just the official stamp of T/A Nankumba. DW2 stated that he was knighted as a T/A in 2003. He said that at the top of the documents referred to as RL 1 and BN 1, the date is 26th October, 2002 while he was elevated as T/A in 2003. The witness explained that his understanding of compensation was that if someone has a place and it is being given a way they are given something locally termed "*chipukuta misonzi*". That such process is overseen by the village head.

The third and last witness for the Defendant, DW 3, was Mr Rodger Leclercq. Mr Leclercq is the promoter of and shareholder in the Defendant company. DW3 adopted his witness statement which is reproduced below. In his evidence DW3 admits that the Claimant is a resident of Chembe Village, T/A Nankumba in Mangochi District and that he used to occupy part of the land on which the Defendant is doing its business. DW3's witness statement from paragraph 6 to 28 is as follows:

6. 'My wife and I considered investing in hospitality in Malawi and more particularly along the lakeshore at Cape Maclear in Monkey Bay under the style Cape Mac Lodge and Froggies Restaurant.
7. Therefore I made enquires at Malawi Investment Promotion Agency (MIPA) and was advised that in order to obtain an investment permit, I was required to give full details of the project stating the exact nature and type of business, the proposed geographical location in Malawi and the proposed capital investment into the business.
8. In the year 2002 I was approached by Mr Enock Break and Mr Ben Namkumba who offered a suitable piece of customary land for the business in Chembe Village, Traditional Authority Namkumba in Mangochi District, which then was occupied by Mr Ben Namkumba and other members of his clan.
9. Mr Ben Namkumba was desirous to rent the said piece of land. After preliminary negotiations, we met again on the 25th day of October 2002. On this day we approached the late Village Headman Chembe to obtain his consent to the said transaction.

10. The next day, with late Village Headman Chembe, we went to Traditional Authority Namkumba to confirm that the said piece of land did belong to the said Ben Namkumba and the others and that there was no other person interested in the said piece of land, and generally to oversee and authorise the transaction in accordance with customary law.
11. During this meeting, a letter, titled "Rent Agreement," addressed to the 1st Defendant, was written by T/A Namkumba's secretary, to authorise the transaction and to put the promise of Rental Agreement in writing. It was signed by all parties concerned and was further witnessed by Mr Loidi Imani, Mr Jozefi and T/A Namkumba. I exhibit the same marked "RL1" copy of the said "Rent Agreement". The amount of rentals was not agreed at this time.
12. With the document referred to in paragraph 12 above and other relevant documents, I went to M.I.P.A. in Lilongwe, firstly to verify the legality of this hand written "Rent Agreement". Secondly to inquire about the subsequent procedure.
13. Mrs Shalom Konyani of MIPA advised me, that the hand written "Rent Agreement" was a valid document in Malawi. That an Evaluation Committee will evaluate my Project proposal within one month, and if approved, I was then to apply for an Investment Permit.
14. When the Evaluation Committee approved the project proposal, and I obtained the investment permit, I thought, that upon the rental agreement being finalised with Mr Ben Namkumba, I could start with my Project.
15. Mr Ben Namkumba and us agreed on the rental amount, and altered the duration of the lease agreement to 99 years. With the undertaking of Mr Ben Namkumba, the authorisation of both, Village Headman Chembe and Traditional Authority Namkumba, we reduced the same into a small hand written agreement. I exhibit the same marked "RL2" copy of the said "Lease Agreement".
16. Based on the document referred to in paragraph 16, I instructed my Attorneys in Windhoek, Namibia, Messrs Shikongo Law Chamber, to draft a formal lease agreement, which my said lawyers did and we proceeded to sign on the 31st July 2003. I exhibit the same marked "RL3" copy of the said "Formal Lease Agreement".
17. I then took the "Formal Lease Agreement" referred to in paragraph 17 to the Registrar of Lands in Blantyre to have it officially stamped and registered.
18. After my wife and I presented the said "Formal Lease Agreement" to the Registrar, we were told that the said "Formal Lease Agreement" was not a valid legal document under the laws of Malawi and that therefore it could not be registered. The Registrar informed us that all customary land in Malawi vests in the President and that people occupying it, have right of use only, but cannot dispose of it either with long term rental or a sale

agreement. He directed me to the Regional office of Ministry of Land in Blantyre, where I met Mr Kwame Ngwira who advised me on the necessary and proper procedures to be followed in order to obtain a registrable lease, which we were told only the Government could grant.

19. Following the events narrated in the preceding paragraphs I realised that we had to start the process all over again in order to get a lawful lease of the said piece of land. Although at the time we had invested a substantial amount of money in this project, the main investment had not yet started. Therefore I strongly considered to “cut my loses” and abandon the project.
20. It was Mr Ben Namkumba who asked me, to please approach with him, the District Commissioner of Mangochi and the chiefs stated in the preceding paragraphs in view of filing an application for the land to office of the District Commissioner, and to re-start the procedure as laid down by law. Please refer to a copy of the Customary Land Consultations with Chiefs form. I exhibit the same marked “RL 4” copy of the said “Customary Land Consultations with Chiefs Form”.
21. Mr Ben Namkumba was informed by the District Commissioner that the person who had the right of use of the land must be willing to surrender his right back to the Ministry of Land when filing such an application. Mr Ben Namkumba and I went to the village headman, and to the Traditional Authority Namkumba, to have such application sanctioned. When the same was done, the application was officially lodged with the District Commissioner, whose office subjected the application to the office of the Lake Committee, and the Office of the Regional Commissioner of Lands, for sanctioning.
22. After carrying out all necessary consultations, the District Commissioner advised us (Mr Ben Namkumba and I) that in accordance with the law, it was imperative that the people who had the right to use the land namely Mr Ben Namkumba, and Mrs Ginnet Chisendera and Mr Nevas Lumbe be compensated and the District Commissioner’s office proceeded with a valuation for compensation of the property in October 2003. I exhibit the same marked “RL 5” copy of the said “valuation for compensation”.
23. The compensation was in the form of money to the tune of K110,000 in respect of Mr Ben Namkumba and relocation of houses in respect of Mrs Ginnet Chisendera and Nevas Lumbe and I proceeded to pay the same through the office of the District Commissioner in Mangochi. I exhibit the same marked “RL 6A” copy of the said “General Receipt” and copies of letters for houses relocation marked as exhibits “RL6B” and “RL6C”.
24. On the 21st February 2004, the Southern Region Land Surveyor came to Cape Maclear to survey the piece of land. On this day Mr Ben Namkumba and his brother Grayson were present, and again, the Land Surveyor repeated to them that once the application has gone through, they will have no more rights over the surveyed piece of land. I recall this being said

while we sat at Fat Monkeys Lodge near the place we were about to lease. The Plaintiff and his brother said they understood the impact.

25. When all the requirements of consultation with chiefs and compensation to users of the land were satisfied, the District Commissioner forwarded our Application of Lease to the Regional Commissioner for Lands responsible for the Southern Region and upon approval we were given the Offer of a Lease of 0.380 of a hectare of customary land at Cape Maclear in Mangochi District the 11th day of August, 2005. I exhibit the same marked "RL 7" copy of the said "Offer of a Lease".
26. Having compensated the people who were occupying the land and having received an offer of lease from the Minister of Lands on behalf of the Government of Malawi, it was clear that the initial "Formal Lease Agreement" (RL 3) was null and void in law. Furthermore the Regional Commissioner of Lands advised us, that we did not have any further obligation to the Namkumba family concerning rental fees, as our obligations were now with the Government of Malawi.
27. At all material times, Mr Promise Sambala accompanied my wife and me in the preceding negotiations.
28. At all material times, we never dealt with Mr Nicco J. G. Kamanga, and he was never a party to any of the agreements we entered into with the Namkumba family. Mr Nicco J.G. Kamanga surfaced, for the first time, in the year 2006, when he initiated an action against my wife and the Commissioner of Lands purporting to challenge the granting of the lease.'

In his evidence in chief Mr. Rodger Leclercq also stated that he was connected to Cape Mac Lodge as a major shareholder. That the company was promoted and started with his late wife. The wife passed away in the course of this civil matter. In regard to exhibit marked RL1 the witness stated that they had discussions with Ben Nankumba and went to the T/A and sought permission to build a lodge. He assisted with a letter to go to MIPA to confirm. In paragraph 15 DW3 referred to exhibit marked RL2 and the circumstances that led to it are that after authorisation they decided on a 99 years lease. That a lawyer in Windhoek prepared the lease agreement which was signed by the witness, Ben, the wife of the witness, the Chief and Promise. The witness mentioned that it was a proper lease agreement which was drawn and brought to Malawi and signed by the parties. The document which the witness referred to in paragraph 16 was received and marked exhibit RL3, that is the formal lease agreement which the attorney prepared in Windwoek. The witness stated that he went to the Registrar of Lands office, where Mr Kwame Ngwira informed him that the lease was not legal and he explained the correct procedure which had to be done through the District Commissioner in consultation with the chiefs. The customary land consultation with chief's document which is referred to in paragraph 20 of DW3's witness statement was received in evidence as exhibit marked RL4. The valuation

of the place was exhibit marked RL5. The witness stated that after meetings, the Chief and T/A Nankumba signed the documents. The DC's office valued the land and the witness had to build two houses, which he did and he also paid money amounting to K110,000 cash through the DC. The beneficiaries were called Nevis and another one was Nankumba, who he is still in the village and he is a fisherman. The DC gave the witness a receipt for the money which was marked exhibit RL6A while the photos of the people who were built houses were marked exhibit RL6 B, where the beneficiary was Mrs Ginet Chisendera. The witnesses for this transaction were Ben Nankumba and Enock Brake. Under exhibit marked RL6C it was Nevas Lumbe. After the procedures were complied with, with the DC, the witness sent a request to Ministry of Lands which led to them receiving an offertory letter issued by Mr K. K. Ngwira, which was exhibit marked RL7. The offer of lease took about a year to come out and the witness and his wife signed it. The original lease of Cape Mac was produced during the court proceedings and received as exhibit marked RL8. After it had be inspected and verified it was returned to the witness for safekeeping.

During cross examination DW3 stated that the Claimant had brought him to court because he objected to the Defendant buying the land in issue. The witness refuted assertions by the legal practitioner for the Claimant that the Claimant "never consented" as the witness claimed to have sufficient evidence that they consented. The witness stated that Mr Nankumba was always there during the processes of acquiring the land. According to DW3 the first lease agreement was not legal and DW 3 was not aware of such irregularity. On the allegation that they never consented, DW 3 referred to exhibit marked RL1 and stated that the intention was to rent the land for a certain number of years to build a lodge. According to DW3 the T/A Nankumba wanted 20 years but the Defendant wanted a much longer period but they agreed for 20 years.

DW 3 stated that RL2 was not a lease but authorisation from Nankumba family to own land after they had sought permission that the lease should take 99 years and that they pay K10,000.00 monthly. For the whole year it would amount to K120,000.00. The witness conceded that the intention was not to take land away. The lease agreement was prepared in Windwoek but when the witness wanted to register it they were told it was illegal.

When the lawyer for the Claimant asserted that there was no clause that he intended to turn the piece of land to be his own, the witness' response was that the Nankumba family waived their right to land and it is registered. DW3 insisted that the land was never in the name of the Nankumba family and they only had the right to use it. DW3 added that the current user was Cape Mac Lodge.

In response to the query by the legal practitioner that the T/A who testified stated that he never met the Claimant while the DW3 stated that he went to Village Headman Chembe with the Claimant and the T/A, DW 3 clarified that at

that the time the chief holding office of T/A was the father of the current T/A. DW3 explained that at the first meeting, which is referred to in the first document, the old T/A was very ill and the secretary received them. DW 3 stated that there was a long process of consultations and valuation. That a form was collected and Ben Nankumba took them to the T/A for signing. That the assessment of the land by officials from the DC was done with the Nankumba family. When the legal practitioner questioned DW 3 as to why the lease was not processed in the name of Ben Nankumba unlike the other lodges, the response of DW 3 was that:

“it could not be... except one or two lodges all other lodges are not legal, they are not doing it right”

When DW3 was referred to exhibit marked RL5 he confirmed that he was agreeable to the compensation assessed by the District Commissioner otherwise he would not have paid it. When the lawyer argued that, the witness simply rebuilt houses or replaced items that were on the land, the response of DW 3 was that:

“I did not do the assessment, I was just told to pay. There were trees and two people on the land. I build new houses where they asked me to build it and they were happy”.

DW 3 mentioned that the total cost was not K110,000.00 as put a cross by the lawyer for the Claimant but two new houses and K110,000.00 which was not paid to the Claimant but the District Commissioner of Mangochi who acknowledged receipt by issuing a receipt before he paid out the money to the Nankumba family.

When the lawyer alleged that the Nankumba family lost out, the witness responded in the following manner:

“they had benefits, took two new houses, they wanted it this way”

When the lawyer for the Claimant contended that the Namkumba family wanted to get K10,000.00 a month for 99 years, the witness emphasised that they wanted it that way, however it was up to the lawyer to ask his client why they forfeited that. It was the opinion of the Claimant’s lawyer that what the witness did in processing the lease is not what the Claimant wanted. The response of DW 3 was interesting when he explained that:

“When I discovered that it was illegal, I could not invest money in something like that, Ben Nankumba is the one who pursued it. I do not know if it is making logistical sense. I suppose they were happy with the compensation so we proceeded with it”.

DW3 insisted that the Nankumba family confirmed through the District Commissioner and Lake Committee that they were waiving their right to land so they could not accuse the witness of cheating them. According to DW 3, he did not convince the members of the Nankumba family to waive their right to land.

DW3 noted that the family members went to court when they learned that the witness wanted to sell the lodge since he is French and he wanted to move on. The witness stated that in the course of operating the lodge, the family members who had been duly compensated created problems by picking up mangoes at the premises of the Defendant. According to the witness, at the time the compensation was paid on 15th October 2003 it was reasonable as there were two brand new quality houses. DW3 was of the view that if it was not a fair deal the beneficiaries would have declined the compensation, which was not the case at hand.

The witness denied building a house for Ben Nankumba, when he was asked in cross examination on that issue. DW 3 also stated that it was the District Commissioner who would know that the money which was paid out was the valuation of trees. DW 3 explained that before the Nankumbas collected the sum of K110,000.00 the DC, the Lake Committee and the land surveyor explained all the processes clearly to them in their language but the family chose to waive their right to use the land. DW3 said that the money was paid through the District Commissioner so that the members of the family could appreciate and understand the land transaction. When the Claimant's lawyer tried to find out if the witness was not surprised by the position of the Nankumba family, it is the view of this court that the response from DW3 seems to indicate that the witness had a better understanding of the applicable land law and principles than the Claimant's lawyer, when he responded in the following manner.

“the land belongs to government and it did not belong to them before. I have a lease, I am not owner, I am a lessor, and it's a big difference, in 99 years government can take it back. I will have use of land for 99 years”.

When questioned if it was not DW3's intention to pay the Nankumba family as earlier arranged, the answer from DW 3 was that the issue had dragged for long, and that there was a formal lease which was legal. DW 3 confirmed that he was there at negotiations and he had Promise as a Malawian translator, who spoke Chichewa. That it was the District Commissioner and not Promise who instructed the witness to pay money to the family. DW3 stated that he however was not present when the family had discussions with the District Commissioner. When DW3 was asked if Mr Nankumba or any of the family told the witness personally that they consented to the lease, the eloquent response of DW 3 was that:

“Mr Nankumba and brother were with me and assisted me to do all documentations to have lease made”.

In further cross examination DW3 was asked if the Nankumba family were agreeable to stopping the payments the witness' response was that:

“I was told by Ministry of Lands not to do anything. Prior and long after offertory I continued paying them. After that, for them to live in peace we made some agreement”.

DW3 noted that once the lease had come out there were some hassles at times. In regard to exhibit marked RL2, DW 3 stated that Ben Nankumba was together with Grayson and DW3 did not know why the Claimant did not sign it. DW3 told the court that the Claimant himself would be better placed to respond. DW3 clarified that after the lease agreement he was paying K10,000.00 but he never paid anything else to the family. The witness stated that he was present at the meeting with Village Headman Chembe and when they went to T/A Nankumba and met the secretary and signed the first paper agreement. However Ben Nankumba was the one who was present when the forms for consulting Chiefs were being conducted and that he is the one who took them for signing before returning them back to the witness.

In re-examination the witness stated that he obtained the Malawi government lease a long time after the offertory in August 2005. On the issue of peace and lack of it, the witness mentioned that

“because the Ministry of Lands said we do not pay rent any more, they stopped clients coming, put stones, my wife and daughter run it but I was not there... they blasted loud music”.

The witness reinstated that he had a formal lease valid for 99 years. His testimony marked the end of the examination of witnesses in this land matter.

The Arguments and Submissions of the Claimant

The Claimant relies on sections 5, 25 and 26 of the Land Act in their submissions and state that all customary land is held on trust by the President for the benefit of the people of Malawi. That the trust powers are delegated to the Minister responsible for land matters and the chiefs. An occupier of customary land does not have title to the land and only has right of use and occupancy: *Mkoka v Banda and others* [1992] 15 MLR 278. That section 5 of the Land Act allows a Minister power to grant or execute leases of dispositions. The Claimant refer to the cases of *Milton N. Msofi v Chikutu Banda* [2007] MLR 245 and *Mervis Chirwa v Faizer Karim* MSCA Civil Appeal which emphasize the need to follow procedures in disposing off customary land. The Claimant notes that in the case of *Mervis Chirwa v Faizer Karim* the Supreme Court, *inter alia*, stated that the right to dispose by grant or sell of customary law can only be exercised if the individual or community seeking to do so has all the essential consents and approvals from the family to the chiefs. The Claimant submits that the principle expounded by the Supreme Court in the case of *Mervis Chirwa v Faizer Karim* resonates very well with the present case.

The Claimant in his submissions contends that from the evidence in court the one question which will solve the matter is the following: *was there consent by the Nankumba family to have the land leases by the government to the Defendant?* The Claimant asserts that the answer to this question will bring out the genesis of this dispute. The Claimant notes that there is undisputed evidence

that prior to the land being leased to the Defendant the parties had agreed an arrangement of "Lease". The Claimant asserts that it has also been established that until the Lease in issue was processed the Nankumba family was enjoying benefits out of the land. According to the Claimant, DW 3 also expressly admitted in court that it was the parties intention from the outset that the Nankumba family would be rewarded financially for as long a period as 99 years. The Claimant states that DW 3 also informed the court he had been prepared to be paying the plaintiff family as per the agreement. That DW3 also conceded that if he had not received contrary advice at the DC's place, he would still be paying the rentals to date. The Claimant argues that there has been uncontroverted evidence that the Nankumba family only started giving trouble when they had been informed of an impending sale of the property by the Defendant.

From the above evidence, the Claimant contends that it is clear that as much as the chiefs might have 'consulted' and signed the consultation with Chiefs forms, the Nankumba family did not know that they were losing their ancestral land to the Defendant. The Claimant asserts that there is clear evidence that his family all along thought that the lease that was being processed would come out in the Defendant's name. The Claimant affirms that he was shocked and surprised when he heard that the Defendant was selling 'their' land. According to the Claimant, the response by DW 3 that he could not tell why the plaintiff would choose to fully relinquish their right of use fully to the Defendant a total stranger for no monetary gain at all, buttresses this point. The Claimant further notes that it is in evidence that there was no further monetary compensation apart from the value of trees and two houses that were demolished and rebuild elsewhere by the Defendant. The Claimant states that DW3 confirmed that he got the land from the plaintiff and only parted with MK110,000.00 being the cost of trees that were on the land and also a further cost of rebuilding the two houses.

It is the view of the Claimant that he obviously got a raw deal. The Claimant argues that 'they were not informed at all that they were losing their user rights completely and would cease to be the owners of the land'. It is the submission of the Claimant that the Chiefs might have been consulted but the plaintiff's / claimant's family were not. The Claimant through his legal practitioners advances an argument that

'...much as they received some sort of compensation, they were not in earnest, explained to that the compensation meant their acceptance of leaving the land for good. To them it was simply replacement value for the trees that were on the land and the 2 houses that were replaced.'

The Claimant contends that 'on the compensation there is no element of the actual value of the land' and that it is only the trees and the two houses that were considered. The court is of the considered view that the Claimant is making contradictory statements when he alleges that his family and himself were not

consulted and then under the same breathe also argues that the compensation was insufficient. Under the process of land acquisition to reach a stage of compensation it implies that the customary users of the land are agreeable to the application for lease. In regard to allegation of insufficient compensation, this court wonders as to when the Claimant reached such an awakening. As the evidence shows that there were several discussion in which several stakeholders were involved including the Claimant himself. Accordingly, if the Claimant and his family were of the view that they needed 'more' or 'better' compensation, then this should have brought this up during the meetings or at the appropriate time lodged a complaint with the officials who conducted the assessment, as they had the capacity to review and adjust the compensation.

The Claimant also argues that the Nankumba family were tricked into thinking that the lease would still come out in their name and the rental arrangement would continue. This court finds that there is no evidence to support such assertion, so it remains an allegation without any merit. The Claimant then goes on to justify his violent conduct towards the Defendant as a protest upon learning that the Defendant was about to sell the lodge. The Claimant submits that his conduct throughout the issue is a clear demonstration that he was never consulted. According to the Claimant, when family consent is allegedly negated the chiefs could not be in opposition to consent. However, this court finds that the Claimant has failed to advance evidence to prove on a balance of probabilities that there was lack of consent from him or the Nankumba family. His assertion that the processes which were followed were tainted with irregularity making the granting of lease to the Defendant void *ab initio* is therefore baseless and without merit.

The allegations by the Claimant that the Defendant acquired the land having collected signatures from the chiefs and that the Nankumba family had not consented or approved of such a transaction is a blatant lie because the evidence before the court shows that it was the Claimant himself who facilitated the completion of the chiefs' consent form by obtaining the necessary names, signatures and stamps. According to the evidence from the defence, the Nankumba family put forward Grayson as the person who would sign on their behalf. The allegation by the Claimant that Greyson's surname is Abele not a Nankumba is irrelevant and of no legal effect as that name was advanced by the Claimant's family and not the Defendant. Actually the name Abele Greyson appears in several other agreements which the Claimant considers legal. Further, legally for customary land the usufruct is vested in the Chief and the Customary Land Consultation with Chief form promotes this understanding when it requires that signatures from the chief and village headman and not individual villagers like the claimant. And as explained by DW2 it is the village headman who consults the villagers before he signs the form. The evidence of DW3 was also clear that it was the Claimant who took this form around to obtain the necessary

signatures from the traditional leaders after the promoter had decided to abandon the project. It is difficult understand how the Claimant who was full aware of the whole process and was deeply involved in it can then turn around and allege that the chiefs signed without consulting him or his family. The Claimant has definitely not approached the court with clean hands when he alleges and submits that the element of family consent was omitted.

The Claimant's prayer is that the lease to the Defendant must be cancelled as it was granted on the wrong premise. The Claimant submits that since, according to him, the parties allegedly have no problem in being in a lease arrangement, the court must order that after the cancelling of the lease, the same should be registered in the Nankumba family and a sublease arrangement should ensue so that the interest of both parties are protected. According to the Claimant, this scenario would realise and restore the alleged original intentions of the parties, i.e., to be in a landlord tenant relationship for 99 years. This court is at a loss when it considers the desperate manner in which the Claimant is requesting this court to indorse an illegal arrangement that is being proposed by him. As has already been noted above, the alleged agreement between the Claimant and Defendant to lease/rent of the piece of land for a long period of time was not only illegal and would not be accepted by the Ministry of Lands but the law too does not allow the sale and disposal of customary land in the manner advanced by the Claimant. The Claimant is fully aware that on 15th February 2007 the High Court in *Nico Kamanga v Josiane Leclercq and Regional Commissioner for Lands*, High Court Civil Cause No. 2829 of 2006 already made a ruling on this same issue. Further, the request by the Claimant that the court declares the Claimant and his clan as the rightful owner of the leased land in question lacks merit and is dismissed.

The Submissions of the Defendant

The Defendant rely on section 28 of the Constitution which grants to the Defendant the right to acquire property and not be arbitrary deprived of such property. The Defendant also refer to section 29 of the Constitution on the right to freely engage in economic activity. Defendant also rely on several case law such as the cases of: *Nico Kamanga v Josiane Leclercq and Regional Commissioner for Lands*, High Court Civil Cause No. 2829 of 2006, in which after the court had considered the purported agreements between the parties herein the court found that the said lease agreements were illegal and that the claims for the lease and rentals would not be sustainable; *Jayshree Patel v Khuze Kapeta and Kaka Holdings Limited*, Civil Cause No. 3277 of 2003 where the Court elucidated the general position of law that interest in land is capable of being disposed of by selling or tenancy for a fixed period. Such interest in land include the right of ownership or licence to possess and occupy land. The Defendant also referred to the foreign cases of *J. T. Straford and Son Limited v Lindley* [1965] AC 269, where the court held that if Defendants use unlawful

means to interfere with trade or business, a tort is committed and the Claimant is entitled to recover damages not only in respect of current losses but also in respect of new business they were unable to undertake. The other cases relied on are those of *Beudesent S.C. v Smith* (1966) 120 C. L. R. 145 and *Markin Island Shipping Corporation v Langhilton* [1983] 2 AC 570, *Rayland v Fletcher* (1866) L. R. 1 Ex 265. The Defendant asserts that the burden of proof is fixed by the state of the pleadings and it is the Claimants duty to prove the aspects he asserts in the affirmative on a standard of balance of probabilities.

In its analysis the Defendant notes that the Claimant's first claim is for a permanent injunction restraining the Defendant from selling the piece of land where it has built their lodge and restaurant. According to the Defendant the only argument presented in favour of this prayer is that the Defendant never bought the land in question, but they were tenants thereon. The Defendant relies on section 5 of the Land Act to assert that one can acquire leasehold interest in a piece of land even without buying the land. That upon the responsible Minister executing a grant, one has leasehold interest in the land. The Defendant states that procedures are laid out in the Land Act which include the payment of compensation upon the previous users suffering any loss as a result of the grant. The Defendant asserts that the village headman of the area consented after consultation with the affected families and that was how compensation was determined. It is contended by the Defendant that there was nothing hidden or fraudulent. The Defendant also states that the issue of fraud was not pleaded. Further, the lease process has not been challenged and the leasehold interest in the land still lies with the Defendant. The Defendant notes that leasehold interest is capable of being sold: *Jayshree Patel v Khuze Kapeta and Kaka Holdings Limited*, Civil Cause No. 3277 of 2003. The Defendant submits that there is no reason advanced that is known to the law that should prevent the Defendants from disposing off their leasehold interest in the land. Accordingly, there is no basis for claiming that the Claimant and his family are the rightful owners of the land. The Defendant argues that the Claimant never challenged the lease process. The Defendant submits that the lease granted by the Minister is intact and the Defendant's obligations are towards the Minister.

On the claim for the payment of outstanding rentals the Defendant relies on the previous civil action on the same land that is the subject matter in this claim to argue that these agreements were illegal. And that after the coming into force of the lease all the agreements lapsed. The Defendant also contends that the agreements kept on being varied with the last one only being valid for two years, which period lapsed by effluxion of time. The Defendant's prayer is that the action be dismissed with costs and that judgment be entered for the counter claim as there was no defence entered on the same. This court is of the considered opinion that the Defendant's argument that some of the claims in the present civil matter were dealt in a previous civil action would have been better articulated

before this court if the Defendant had raised the doctrine of *res judicata* as a defence.

The Applicable Law

The applicable law is contained in the sections 5, 25 and 26 of the Land Act which both parties have referred to as well as case law. Apart from the cases cited by the parties this court also finds the case of *Silrage Sultan v GVH Mdalamkwanda and others* [2012] MLR 349 relevant and applicable in this matter, as it deals with acquisition of a lease interest on land that was previously customary land. In *Silrage Sultan v GVH Mdalamkwanda and others* [2012] MLR 349 where the Plaintiff as a property developer sought to use a piece of land he had acquired in Salima in accordance with the terms of the lease but had met resistance from fishermen who were docking their fishing boats on the land, and had also established semi-permanent occupancy of the land without the plaintiff's licence or consent. He required the intervention of the Court in order to evict the fishermen. In its judgement the court noted that

‘before the land was leased, it was acquired by the Minister Responsible for Land Matters and through that process of acquisition the land changed status from customary land to public land. The land was leased after it had been acquired by the Minister and upon its being leased to the lessee it became private land. The plaintiff in the case was the title holder or owner following the lease being granted to him.’

It was held that customary law no longer applied to the land as it was leased land, land that the Minister Responsible for Land Matters acquired to become public land for eventual conversion to private land through a lease agreement. The court found that the witness from the Ministry of Lands clearly stated that the Consultancy with the Chief Form was completed not for purposes of sale of customary land but for purposes of acquisition. And that only the government could acquire customary land for purposes it requires it for.

The Decision

In terms of case management this court notes that although the Claimant wanted the matter to be treated as urgent, he did not care to comply with the rules of practice and procedure. For instance, the trial bundle was filed and served on 13th July 2015 for a trial which was commencing on 14th July 2015. Further, the trial bundle only contained one witness statement and his prayer in court on the first day of trial was that the matter should be adjourned so that they could file witness statements of two other people. The Claimant was also in the habit of crafting his claim as trial progressed in that he made applications for the filing of additional witness statements and amendment of list of documents in the course of the trial. Further the Claimant did not tender in court original documents while most of the documents tendered by the Defendant were also photocopies.

If the idea of Ben Nankumba was that the lease for the lodge should be in his name as his lawyer asserted while cross examining Mr. Roger Leclercq, DW3, there are several questions that come forth. One wonders why the Claimant did not apply for the lease himself? Why was the Claimant assisting the promoter of the lodge to apply for a lease? Why did the Claimant after obtaining the signatures from the chiefs proceed to hand over the form to the Defendant if his wish was that the lease should be in his name? Why did he not object to the application during the consultation process? The evidence from the Claimant does not adequately address these questions.

There is also no evidence to support the Claimant's allegation that his family was not consulted. As has already been noted above, the evidence reveals that the Claimant was harbouring false hopes that first, he would reap where he did not sow by possibly having the lease for the Cape Mac lodge registered in his name. This may explain why he was working for the Defendant in anticipation that somehow he would also become a shareholder. Secondly, he had the desire to receive monthly rental income from the Defendant. However, the Claimant has not advanced any legal authority which would support his claim that he is entitled to monthly rentals for surrendering his usufruct rights over a customary piece of land, which piece of land was converted to private land and leased by the government to the Defendant. The registering of the lease in the name of the Defendant broke asunder his ambitions. This legal action is therefore arising from dashed hopes of maintaining some unknown feudal relationship by receiving regular income, seething anger as well as vindictiveness against the Defendant due to the fact that the Defendant has a lease with the Malawi government. The Claimant having failed to establish his claim this court finds that there is no legal requirement on the part of the shareholders of the Defendant to enslave themselves by rendering homage to the Claimant through the payment of monthly rentals.

The finding and holding of this court is that there is no legal claim that the Claimant has managed to prove in law. The fact that Defendant obtained a leasehold interest of the land where Cape Mac Lodge and Froggies Restaurant is located has been proved to have gone through lawful processes for registering a lease in this country. As has been argued by the Defendant the allegation of fraud by the Claimant was never pleaded and particularised as is required by law. It simply sprang up in the course of cross examination by the Claimant's lawyers of the defence witnesses. However, the Claimant in his evidence failed to establish fraud on the part of the Defendant.

As stated by DW3 the Defendant can sell his interest in the lease. If the Claimant is desirous of acquiring this land, then let him express his interest to acquire the remaining leasehold interest. Such approach would enable him to acquire the piece of land through lawful means rather than commencing baseless claims, in instalments, in the courts of law. This court finds that the conduct of

the Claimant shows that he is a person who knew what he was doing when he encouraged Rodger Leclercq not to abandon the project and proceeded to assist him in obtaining the necessary consent from the chiefs and the Claimant's family. However, there was no evidence advanced before the court from either the Claimant or the Defendant in support the allegation that the lease was going to be processed in the name of the Claimant. It remains a mere allegation on the part of the Claimant. Even if this is what the parties had allegedly agreed on, it is difficult to understand why the Claimant would encourage Mr. Rodger Leclercq not to abandon the project, run around with the forms to obtain consent from the Chiefs then hand the documents back to Mr. Rodger Leclercq for processing at the Ministry of Lands.

In the understanding of this court, if the Claimant had the desire to have the lease registered in his name he had about three options available to him which he could have freely invoked: first, he could have just gone straight ahead to apply for a lease from the government without involving or consulting the Defendant. Secondly, he could simply have objected to the application for lease by the Defendant. Thirdly, he should have refrained from assisting the Defendant in completing the lease forms and agreed with the Defendant's decision to abandon the project. On the other hand, the evidence on record of the case shows that the Claimant never applied for a lease in his name, he never objected to the application that was being made by the Defendant and that surprisingly the Claimant encouraged the Defendant to make the application. Actually, the Claimant did not refute the evidence from DW3 that the Claimant showed his support for the project by assisting the Claimant to obtain the signatures from the chiefs which were required in the consent form. The evidence of DW2 was also not disputed at all that the Claimant worked for the Defendant as a cleaner for a period of about one year. Now by any sight of imagination how can a reasonable person construe such conduct as demonstrating that the Claimant was never consulted as he claims and argues in his submissions. The court cannot allow such prevarication. The issue of the alleged fraud or trick by the Defendant and lack of consent on the part of the Claimant's family does not hold water.

It has already been observed that the Claimant's allegation that there was an agreement that the lease would be in his name is not proved by any evidence. While this court has found that the Claimant's family gave consent to have the customary land which they were using to have the government process a lease in favour of the Defendant, the assertions of the Claimant seems to reveal that the Claimant held an ulterior motive that the lease for the land would somehow be in his name and that his family would still continue to be receiving monthly rentals from the Defendant. Having shown that it was a mere expectation of the Claimant, it can safely be concluded that it must have been the Claimant who wanted to trick the promoter of the Defendant so that he becomes the lessee of the piece of land instead of Cape Mac Lodge and Froggies Restaurant (Pty) Limited. The aim

of the Claimant seems to be that the Defendant should not be autonomous but be bound up with the Claimant, a mere villager who has neither promoted a business of the nature of the Defendant's nor invested any money in it.

All the three defence witnesses were clear in their testimony that there was a lengthy process that the Defendant had to go through in order to secure the lease and that several consultations and explanations were made to the Claimant and the members of his clan. The most important evidence which quashes the Claimant's allegations was that of the Traditional Authority Nankumba, as DW2, who also happens to be a relation of the Claimant. This Chief clearly stated that the procedure which the traditional leaders follow in processing applications for lease of land is well known to all the chiefs and the members of the community. The chief, whom as has already been noted he has usufruct rights, stated that as far as his office is concerned the family of the Claimant was consulted. However, DW2 went to reveal that although he had found the Claimant working for the Defendant on the project construction site in 2003 when he visited the area with officers from the Ministry of Lands, some years later the Claimant was bent on frustrating the operations of the Defendant. Such that the traditional leader was invited by the Defendant to spend a night at the lodge of the Defendant in order to witness for himself the malicious acts of the Claimant against the Defendant which were affecting the business. These malicious acts were also noted by the DW3 in his evidence and included among others activities, playing loud music all night long, blocking the access road to the lodge and stealing mangoes from the premises of the Defendant. This court will not misinterpret the malicious acts carried out by the Claimant against the Defendant as conduct that he was not consulted as he wishes this court to believe, but it call a spade a spade as DW3 had done. These were violent acts by the Claimant which fall under criminal offences for which the Claimant should have been reported to law enforcement apart instituting a civil action for damages. The Defendant was entitled to peaceful enjoyment and use of the land that it had leased from government. Apart from the abovementioned malicious acts, the Claimant and his witness in this case also commenced litigation against one of the shareholders of the Defendant, the late wife of DW3, which we have learned was dismissed for want of prosecution. The Claimant being dissatisfied with the previous civil action he decided to commence the action herein. Litigating in instalments like this and lodging complaints against the promoters before several forums is also a form of harassing the Defendant and cannot be condoned by this court.

Having subjected the entire evidence on record to a close scrutiny this court is convinced that there was due process of law and compensation paid as determined by the District Commissioner and the Lake Committee in consultation with the members of family of the Claimant and the chiefs. The issue of fraud is baseless as it was merely alleged in court in the course of giving evidence and its particulars were neither pleaded nor proved. On analysis the court finds that the

Claimant, Mr. Ben Nankumba and Mr. Nicco Kamanga are two selfish people who have conspired to tell lies under oath in order to reap financial benefits from the investment of the Defendant. Having failed to get the benefits that they had hoped for from the working relationship with the Defendant, the Claimant decided to harass the Defendant through various means which have been noted above. The court has noted the extreme levels of hostility and violence that was displayed by the Claimant towards the Defendant and its shareholders. This court will not allow the Claimant to use its legal authority to further intimidate and abuse the rights over land that the Defendant was granted by the government through a lease.

In as much as the categorisation of land under the Land Act into public, private and customary land might have created problems in ascertaining the land area in the customary space leading to insecure land tenure, the law only gives the Claimant rights of use and occupancy of the land in issue. The customary estate is a difficult arena to understand as section 5 of the Land Act does not give anybody any enforceable right. Customary land tenure interest in land is transferable but not saleable. That is why the government was able to dispose of the land in issue as private land when it granted a lease to the Defendant. Acquisition of the lease by the Defendant entails exclusion of the Claimant and his family members from the land in issue. As a right holder the Defendant has a right to transfer his interest in the lease to another through a sale. If the Claimant has been deprived of arable land then he should take it upon the government to provide him access to such land.

Customary land tenure under the Land Act does not create any rights in any person in customary land. The common understanding is that customary land tenure is communal in nature and that a person only has usufruct rights. In any event what the Claimant should understand is that in this case the Defendant did not buy the land but that he acquired leasehold interest in a piece of land, a procedure which is allowed under section 5 of the Land Act. The lease process has not been challenged and the leasehold interest in the land still lies with the Defendant. By the authority of the case of *Silrage Sultan v GVH Mdalamkwanda and others* [2012] MLR 349 the Defendant is entitled to peaceful possession of the land in issue. The Claimant pled incorrectly by stating that the Defendant is a tenant because the Defendant has a right to the land as a lessee. It should be noted that ignorance of the law is neither a defence to the Claimant nor the Defendant. That is why the Defendant dumped the first lease which was prepared in Windhoek and followed the advice that was given by the Ministry of Lands. The arguments advanced by the Claimant are therefore rejected by this court.

Having found and held that the Defendant is the lawful and rightful owner of the leasehold interest comprised in the land in question this court dismisses the Claimant's action in its entirety. Consequently, the interim order of injunction restraining the Defendant from selling the said piece of land, being known as

Cape Mac Lodge and Froggies Restaurant at Cape Maclear, is vacated. The Defendant can deal with the land according to law. The claim for outstanding rental arrears is dismissed for lack of merits. So is the Claimant's prayer for the declaration that he is the rightful owner of the piece of land in issue.

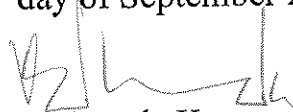
The Defendant's counterclaim partly succeeds and an order is granted restraining the Claimant from further doing the acts complained of in this civil matter. However, the Defendant's claim for damages for loss of revenue is dismissed, as being special damages, it was neither specifically stated nor proved.

In conclusion, this court finds and holds that the Claimant's civil action lacks merits and is dismissed in its entirety.

The costs occasioned by this action and all proceedings are awarded to the Defendant and are to be borne by the Claimant, Mr Ben Nankumba. The Defendant is to file and serve a bill of costs which will be assessed by the Registrar

Either party is at liberty to appeal to the Malawi Supreme Court of Appeal against this judgment.

Pronounced in open court this 28th day of September 2021 at Chichiri, Blantyre.



Dorothy nyaKaunda Kamanga

JUDGE

Case information:

Mr. Khonyongwa,	Counsel for the Claimant.
Mr. Chibayo	Holding brief on behalf of Counsel for the Claimant.
Mr. Masanje,	Holding brief on behalf of Counsel for the Defendant.
Mrs. Ndunya	Senior Personal Secretary.
Mr. Mutinti,	Court Reporter.
Ms. Ngoma,	Court Clerk.
Mr. Ng'ambi,	Court Clerk.

