

**IN THE HIGH COURT FOR ZAMBIA**

**2015/HPC/0307**

**AT THE COMMERCIAL REGISTRY**

**HOLDEN AT LUSAKA**

**(Civil Jurisdiction)**

BETWEEN:



OLIBUL INVESTMENTS LIMITED

PLAINTIFF

AND

LUKA SAMUHANGA AND HIS FAMILY MEMBERS DEFENDANT

**Before the Honourable Lady Justice Irene Zeko Mbewe**

*For the Plaintiff: Mr. Chibalabala of Messrs John Chibalabala Legal Practitioners*

*For the Defendant: Mr. G. Phiri of Messrs PNP Advocates*

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## **JUDGMENT**

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### **Cases referred to:**

1. *The Attorney-General V Sam Amos Mumba* (1984) Z.R. 14 (S.C.)
2. *The Attorney-General V D.G. Mpundu* (1984) Z.R. 6 (S.C.)
3. *Re Vanderveill* [No. 2] 1974 1 ALL E R 47
4. *Masauso Zulu v Avondale Housing Limited* (1982) ZR 172
5. *Andrew Tony Mutale v Crushed Stones Sales Limited* (1994) S.J. 98 (SC)
6. *Miyanda v Attorney-General* (2009) ZR 76
7. *Communication Authority v Vodacom Zambia Limited* [2009] ZR 196
8. *Anti-Corruption Commission v Barnett Development Corporation Limited*

9. *Knight v Knight* [1840] 3 bev 148
10. *Westdeutsche Landesbank Girocentrale v Islington LBC* [1996] 2 WLR 802*Westdeutsche*

**Legislation and Other Works Referred To:**

1. *Lands and Deeds Registry Act, Cap 85 of the Laws of Zambia*
2. *McGregor on Damage* (1972) 13<sup>th</sup> Edition, Sweet and Maxwell, London
3. *Alastair Hudson "Equity and Trusts" 3<sup>rd</sup> Edition, Cavendish Publishing Limited, 2003*
4. *Black's Law Dictionary 9<sup>th</sup> Edition, Thomson Reuters*

By way of Writ of Summons, the Plaintiff claims against the Defendant for the following reliefs:

1. *An order for delivery up of a 250 KVA Baifa Diesel Generating Set of model No. BF-C275DS*
2. *A mandatory injunction directing the Defendant to give up detention and allow the Plaintiff to collect the 250 KVA Baifa Diesel Generating Set of model No. BF-C275DS*
3. *Damages for loss of business*
4. *Damages for inconvenience*
5. *Interest*
6. *Costs.*

According to the Plaintiff's amended Writ of Summons and statement of claim, the Defendant is a non-executive director on the board of the Plaintiff representing the interests of Wabituo

Community while the rest of the Defendants are his family members who include Saul Samuhanga and Richard Samuhanga. According to the Plaintiff, a 250 KVA generator set was purchased and stored at the Defendant's house since at the material time, the sand quarry and washing facility project was under construction at the Plaintiff's farm being Farm No.31513 Lumwana East, Solwezi. The Plaintiff averred that when it tried to collect the generator set, the Defendant and his family members denied them access, and efforts to get assistance from the Police proved futile as the Defendants became aggressive and violent. The Plaintiff averred that as a result of the Defendant's actions, this affected the Plaintiff's commencement of the sand washing business operations thereby leading to a loss of income from 6<sup>th</sup> June 2015 of K80,000.00 per day. According to the Plaintiff, the unlawful detention of the generator set adversely affected the Plaintiff's business and financial projections.

In the amended defence, the Defendant averred that Luka Samuhanga and Brian Mulopu are members of the Plaintiff board of directors in their capacity as trustees of the Wabituo community



which incorporated itself as Wabituo Construction Materials Limited. It is averred that Wabituo community through Pekaiah Enterprises Limited represented by the Mbimbi family has a 15% stake in the Plaintiff Company. According to the Defendant, the generator set could only be released by him and that the Plaintiff's director in his absence took armed police to the Defendant's property.

The Defendant averred that the Plaintiff has not suffered any loss as the Plaintiff has provided no proper basis for the alleged speculative loss of income from 6<sup>th</sup> June, 2015. It is averred that Lubilo Mate the director of the Plaintiff has refused and or neglected to liaise with the Wabituo community through its trustees Luka Samuhanga and Brian Mulopu regarding the community's share in the Plaintiff's mining activities. The generator set could not be released into the custody of Lubilo Mate before an agreement was reached and that Lubilo Mate refused to meet with the Defendants to discuss the same. The Defendant denied that the Wabituo community stand to lose 250 hectares of land that was contributed to the Plaintiff's project if the subject loan is recalled. According to



the Defendant, he did not refuse to release the generator set but set a precondition for parties to agree as to where the generator set would be located before its release as well as an agreement regarding the benefits to be derived by the Wabituo community from the Plaintiff's project owing to their equity in the form of 250 hectares of land to the Plaintiff. The Defendant averred that the generator set had not been unlawfully detained by his action but that the Plaintiff's director Lubilo Mate was the one who refused or neglected to discuss with the Defendant where to position the said generator set. The Defendant set out particulars of breach of trust and averred that preceding the formation of the Plaintiff Lubilo Mate secured the agreement of the Wabituo community represented by the Defendant and Brian Mulopu to register 250 hectares of the Defendant's land in the Plaintiff's names while shares in the Plaintiff company would be held by the Defendant and Brian Mulopu in trust for the said community. That the Defendant and Brian Muplou were made non executive directors and are unable to participate in affairs of the Plaintiff on behalf of the Wabituo community. The Defendant averred that as a result, they have suffered loss and damage.

The Defendant counterclaimed against the Plaintiff for the following reliefs:

1. *A declaration that the Plaintiff is a lease of farm No. 31513 on resulting trust for the Wabituo Community through its trustees to which it shall revert after discharging its indebtedness to Norsad Finance Limited of Botswana and Grogin Africa Fund Zambia Limited.*
2. *A declaration that Farm No. 31513 is held by the Plaintiff on trust for the Defendant and Wabituo Community as beneficial owners.*
3. *An order directed to the Plaintiff to rectify its shareholding structure by allotting and/or transferring shares in the Plaintiff to the Defendant and Brian Mulopu to hold in trust for the Wabituo Community.*
4. *An order directed to the Plaintiff and its Managing Director to apportion executive functions and/or allow participation in the day-to-day operations of the Plaintiff to the Defendant and Brian Mulopu.*

5. *An order that the Plaintiff do execute and deliver to the Defendant a conveyance of farm 31513 into the Defendant and/or Wabituo Community's now incorporated entity called Wabituo construction Materials Limited upon its indebtedness being discharged with Norsad and Grofin.*
6. *Further and/or in the alternative, an order for rectification of Certificate of Title of Farm No.31513 to reflect the Defendant and/or Wabituo construction materials limited as lease for the residue of a term of 99 years in trust for the Wabituo Community.*
7. *Damages.*
8. *Interests on all sums found due.*
9. *Any other relief that the court may deem fit.*
10. *Costs.*

According to the Defendant, sometime in 2012 he together with one Brian Mulopa as agents of the Wabituo community acting on its behalf partnered with Lubilo Mate and Jackson Kungo to form the Plaintiff Company. That the community was allocated 250 hectares of land with the consent of Chief Mukumbi of Ibaloli chiefdom. That



at the material time, the Wabituo community had not registered and incorporated a company hence the certificate of title was obtained and registered in the Plaintiff Company's name in trust for the Wabituo community. That upon incorporation of the Plaintiff and registration of Farm No.31513, Solwezi East in the Plaintiff's name in trust of the community, Lubilo Mate without consulting Wabituo community allocated 12,000 shares in the Plaintiff Company to an entity known as Pekahiah Enterprises Limited. By an agreement between Wabituo community and Lubilo Mate, Jackson Kungo, the Wabituo community allowed registration of Farm No.31513, Solwezi into the Plaintiff's name so as to use the farm as collateral in accessing equity finance from Norsad Finance Limited of Botswana in the sum of US\$1,000,000.00 and a capital contribution of K2,000,000.00 from Grofin Africa Fund Zambia Limited.

Consequent to the said agreement and prior to incorporation of the Plaintiff and registration of the farm, and contrary to the agreement, the Defendant and Brian Mulopu were made non-executive directors in the Plaintiff Company without any shares allocated to

them. According to the Defendant, it was agreed that Brian Mulopu and himself would hold shares and receive dividends from the Plaintiff and that the shares would be held in trust for the community. It was agreed that the shareholding structure of the Plaintiff would be rectified by allotting shares to the Defendant and Brian Mulopu upon receipt of the facility from Norsad Finance Limited of Botswana and Grofin Africa Fund Zambia Limited but that in breach of this Lubilo Mate and Jackson Kungo refused and/or neglected to do so as agreed. The Defendant contended that due to this breach, the community through the Defendant and Brian Mulopu as its trustee suffered loss and damages.

The Plaintiff filed a witness statement which I have carefully noted and is a repeat of the contents of the statement of claim.

In cross-examination, PW1 Lubilo Mate admitted that the generator set being claimed by the Plaintiff had since been returned a year ago from the date of the writ and that it was in use. PW1 stated that the Defendant was no longer a director in the Plaintiff Company. PW1 admitted that the Plaintiff herein is suing its director and that there was no documented board resolution allowing the Plaintiff to

do so. The witness was referred to page 14 of the Plaintiff's bundle of pleadings and asked to explain how the generator set found itself at the Defendant's premises. PW1 stated that the Defendant demanded that they store the Plaintiff's equipment together with the generator set because the Plaintiff Company had no suitable premises within the locality to store the same, of which the Plaintiff did not object. According to PW1 the generator set in question did not need shelter despite being a humongous industrial set. PW1 stated that he was not aware of the fact that security had to be contracted on a daily basis to secure the generator set or that a shelter had to be constructed to protect it from the elements of weather.

In respect to the picture on page 57 of the Plaintiff's bundle of pleadings, PW1 told the Court that what is in the picture is a barricade that was erected to prevent the Plaintiff from accessing the generator set. PW1 admitted that he is the Chief Executive Officer of the Plaintiff Company and that he is a majority shareholder who for lack of a better term calls the shots. When asked as to who the Plaintiff had sued apart from the named



Defendant, he stated that the suit is against the Defendant and his family members namely Richard Samuhanga and Saul Samuhanga who are the Defendant's sons as well as the Defendant's father whom he did not name. Further when asked as to whether the said people were aware of the suit and have been served with documentation, PW1 responded in the affirmative and added that he filed an affidavit of service in respect of the same. PW1 when asked as to who prevented the Plaintiff from collecting the generator set, he responded that it was the Defendant. PW1 was referred to page 15 of the Plaintiff's bundle of pleadings particularly paragraph 8 and asked if he had tendered evidence before Court to prove that the matter was reported to the Police, and he responded that this was not done. PW1 admitted that there was no call out issued to the Defendant regarding the matter before Court but stated that there are witnesses who can testify to this effect.

PW1 was referred to pages 63-66 of the Plaintiff's bundle of documents and asked the purpose of the tax invoices of which he explained that the tax invoices were showing the nature of the business and a picture of the volume of trading of the Plaintiff

Company as at October 2015. When asked as to whether the said pictures showed the loss of ZMK80,000 being claimed by the Plaintiff, PW1 stated that it showed the income that the Plaintiff should have generated had it had access to the generator set. PW1 was asked as to what date appeared on the invoice and he responded that it was 27<sup>th</sup> October, 2015, and that the generator set was returned around 23<sup>rd</sup> July, 2015. PW1 then admitted that at the time the invoices were generated, the Plaintiff already had the generator set, and when asked as to how the Plaintiff would have made a loss when it already had the generator set he stated that as a result of commencing business operations later than the start date, the Plaintiff had lost its projected income. PW1 conceded that the Plaintiff had not demonstrated before Court any contractual obligation that it had showing the projected income to support the loss of ZMK80,000. According to PW1, business should have commenced on the 6<sup>th</sup> of June, 2015 when the Plaintiff first attempted to collect the generator set. In addition, PW1 stated that the Plaintiff's bundle of documents has photographs that show the events that occurred on 6<sup>th</sup> June, 2015 though admittedly the photographs did not show the date.

PW1 stated that the Defendant Luka Samuhanga was aware that the company was supposed to commence operations on 6<sup>th</sup> June, 2015 and that there was a board resolution to that effect which unfortunately was not before Court. Further, that the Court granted the Plaintiff an injunctive order for seizure of the generator set on 17<sup>th</sup> July, 2015 but there was a delay as to its collection due to an administrative delay as the Sheriff had to be involved. PW1 stated that the Plaintiff only has two natural persons who are shareholders and that the principal persons that the Plaintiff dealt with to secure funding of the project were the Defendant and Brian Mulopu. According to PW1, the land in question did not belong to the two persons but that it belonged to the five village headmen who had delegated the responsibility to their children, the Defendant and Brian Mulopu. When referred to page 32 of the Defendant's bundle of documents, PW1 stated that the letter was not issued by Chief Mukumbi who doubted the authenticity of the signature. PW1 stated that there are no Council minutes proving who the land was allocated. He reiterated that the land belongs to Wabituo community which community authorised Pekaiah Enterprises Limited as the entity the Plaintiff should deal with and that the



Defendant was signing on behalf of Pekahiah Enterprises Limited. When referred to page 48 of the Plaintiff's bundle of documents, PW1 confirmed that the printout from Patents and Companies Registration Agency (PACRA) only shows the name of Pekahiah Enterprises Limited and that the column for directors and shareholders was left blank. Further that page 8 of the same bundle shows a deed of participation executed by three parties being the Plaintiff, Pekahiah Enterprises Limited and Hezron Salungwe, and that Wabituo Community was not a party to the said deed. PW1 stated that the project as stipulated under the deed was to benefit Wabituo community and that the parties to the deed of participation were supposed to represent the community. PW1 denied that one of the benefits meant to accrue to the community was accessing power through the generator set and that the issue of the location of generator set was never in contention. When referred to page 2 of the Defendant's supplementary bundle of documents PW1 stated that he was familiar with the contents of the documents and that according to the documents, Pekahiah Enterprises Limited was a special purpose vehicle to be used as the Wabituo community had not incorporated a company. PW1 reiterated that Pekahiah

Enterprise Limited was used for the purpose of forming the partnership with the community and assigning shareholdings within the Plaintiff Company at PACRA.

That consequently, on their own accord as members of the Wabituo community Brian Mulopu and the Defendant became part of the deliberations and that the land on which the sand mining project is located is owned by the community which it voluntarily handed to the Plaintiff. That the land was given to the Plaintiff in exchange for fifteen percent (15%) of the shareholding to Pekahiah Enterprises Limited and that Pekahiah Enterprises Limited came to own fifteen percent of the shareholders in the Plaintiff company because of Wabituo community. When referred to page 18 of the Defendant's bundle of documents, PW1 confirmed that the said affidavit was sworn by him and there was no mention of Pekahiah Enterprises Limited in it and according to the affidavit the land would revert to the Wabituo community after completion of the project. PW1 stated that according to a letter by William Bimbi the principal officer of Pekahiah Enterprises Limited, this entity was simply being used as a special purpose vehicle. PW1 stated that he signed a transfer of

shares from the Plaintiff company Pekahiah Enterprises Limited representing the Wabituo community and that the same was registered with PACRA although it was not exhibited. He went on to state that the Defendant coerced him to sign a letter drafted by him purporting to hand over the land to the Wabituo community and construction materials as shown on page 19 of the Defendant's bundle of documents. When asked as to whether the message in the letter on page 19 of the Defendant's bundle of documents was the same as that in paragraph 18 of his affidavit, PW1 agreed but added that both documents were originated by Brian Mulopu and the Defendant. He confirmed that in paragraph 11 of his witness statement he agreed that the Chief gave the land to the Wabituo community and reiterated that the community co-opted Pekahiah Enterprises Limited and that the owners of Pekahiah Enterprises Limited are from Wabituo community as shown on the document from PACRA bearing the name of Edwin Bimbi a member of the community.

PW1 further stated that the Defendants are members of Wabituo community and that there is an agreement between them and



Pekahiah Enterprises Limited. He denied having orchestrated the transfer of shares in exchange of titled land in order to obtain a loan as it was a requirement from the lending institution to have titled land in order to obtain money. PW1 however reiterated that the Plaintiff did not push for the land to be titled but merely made a request to Wabituo community to have the Defendants and Wabituo community hold shares in the Plaintiff Company through Pekahiah Enterprises Limited and that when getting title for the 250 hectares of land he dealt with the Wabituo community and not Pekahiah Enterprises Limited. That all the documents signed on behalf of the community through Pekahiah Enterprises Limited originate from the Defendant through Brian Mulopu although he did not have documentary evidence in Court. That according to a letter on page 17 of the Defendant's bundle of documents signed by the Defendant and Jackson Kangu a shareholder in the Plaintiff Company, it is a request by the directors of the Plaintiff Company and the Wabituo community addressed to the Commissioner of Lands. PW1 stated that in accordance with the Plaintiff's bundle of documents, the title for the 250 hectares is in the Plaintiff Company's name and it belongs to Wabituo Community. PW1 stated that the parties to the

shareholder's agreement on page 21 of the Plaintiff's bundle of documents are Jackson Kungu and himself being shareholders in the Plaintiff Company which includes Pekahiah Enterprises Limited and that the Defendants are not part of the said agreement. In respect to the deed of participation, PW1 stated that it is not true that Wabituo community is excluded in the said deed and shareholder's agreement, and that both documents were executed by the Defendant and Brian Mulopu. PW1 however admitted that the Chief in the letter on page 22 of the Defendants' bundle of documents disowned Pekahiah Enterprises Limited in that he never allocated the land to Pekahiah Enterprises Limited but to members of Wabituo community.

On the issue of threatened violence as stated on pages 57 to 62 of the Plaintiff's bundle of documents, PW1 stated that he was the one being threatened by the Defendants in his individual capacity and as the Plaintiff company's representative. PW1 stated that he does not appear in the photographs as he was the one taking photographs and that page 60 shows a photo of him being threatened by the Defendant and identified a witness in on one of

the photographs. Further that the photographs were taken on 6<sup>th</sup> June 2015 and that the photographs show some angry individuals. He testified further that he had difficulties with William Bimbi a member of Pekaiah Enterprises Limited and that he even took him and his family to the Police for grabbing keys for all the Plaintiff Company's trucks. PW1 stated that the sand mining plant was ready for hand over on 6<sup>th</sup> June 2015.

PW1 stated that Hezron Silungu is a party to both the deed of participation and shareholder's agreement, and that he handed over his mining right to the Plaintiff and that he was not paid money for the mining right as he is a member of the Wabituo community. He went on to state that Pekaiah Enterprises Limited had an environmental permit licence from Zambia Environmental Management Agency and the Plaintiff took both Pekaiah Enterprises Limited and Silungu's rights at no consideration.

In re-examination PW1 stated that the Chief doubted the authenticity of the signature on the letter on page 32 of the Defendants' bundle of documents and that he questioned one of his sons who admitted to having been the one that signed it. PW1



stated that upon the revelation by the chief's son that he is the one that signed the letter, the matter was dropped as the community could not institute criminal proceedings against the Chief. In relation to the exclusion of Wabituo Community from the documents before Court, it was his testimony that the community was not a legal entity but a collection of people in 17 villages who appointed two people namely Brian Mulopu and the Defendant to represent their interests. PW1 stated that the community also appointed Edwin Bimbi and William Bimbi. On the issue of the 15% allocated to Pekahiah Enterprises Limited, he stated that some members of the Wabituo community incorporated Pekahiah Enterprises Limited and when the Plaintiff went to work with the community it was the only registered entity found and that is how the Plaintiff started dealing with Pekahiah Enterprises Limited to undertake preparations with the loan lenders and the company that would eventually get shareholding. PW1 stated that the chief when handing over the land to Wabituo Community handed it over to five headmen of that community and their children and that it is the members of the same community that partnered with the Plaintiff. On the photographs produced before Court, PW1 stated that the

Defendant and his two sons threatened him with witchcraft and that is why he took the photographs.

PW2 Hezron Silungu relied on his witness statement filed herein. In cross-examination he stated that he had rights which he surrendered to the Plaintiff Company and that there was an agreement to pay the whole community and not him as an individual. Further that it was agreed that a share would be given to the community but that there was no share to be given until after realization of profit from the work. PW2 went on to state that he was party to the agreement on page 8 of the Plaintiff's bundle of documents and that the other parties are the Plaintiff and Pekaiah Enterprises Limited. PW2 stated that the Defendant was also a party as he was representing Pekaiah Enterprises Limited. PW2 stated that he transferred his mining right to the Plaintiff to collect and sell sand from Wabituo area on a piece of land that was given to the community by the chief. PW2 added that for one to obtain mining rights it was a requirement to first get permission from the chief who issues a letter which is then submitted to Ministry of Mines. At the Ministry of Mines, an artisan mining rights are only

given in the name of person in a group and that that is how PW2 acquired the mining rights and that the licence he obtained was for the whole community. However, PW2 did not have the said licence before Court but insisted that there is a letter on page 6 of the Plaintiff's bundle of documents in which he transferred his rights to the Plaintiff. PW2 stated that the land that Zano licence gave the community was 6.6 hectares and added that he did not have proof of the same.

When referred to page 6 of the Defendant's bundle of documents he confirmed that the chief approved an application that 250 hectares of land be given the Wabituo community and the chief. PW2 confirmed the Defendant is a director of the Plaintiff and that the generator set is in the custody of the Plaintiff at the site where it's operating from. PW2 stated that he is a trustee of Wabituo sand mining and that the Defendant was a representative of the community to which PW2 belonged.

In re-examination, he informed the Court that at the beginning of the Project, the Chief gave permission to Zano Mining to mine over a small area of 6.6 hectares and when the Plaintiff joined the



venture, the community went back to the Chief and were given 250 hectares. That the 6.6 hectares is within the 250 hectares.

PW3 was Jonas Fundamkawa a village headman at Kankomba Village, who relied on his witness statement. In cross-examination he testified that he had worked for the Plaintiff for more than one year. PW3 confirmed that from June to July 2015 there was no production at the plant as there was no generator set to generate electricity and that production was supposed to commence in June 2015. When asked as to how he knew when production was scheduled to commence owing to the fact that he was not a member of the management team of the Plaintiff, PW3 responded that he was able to discern what was happening despite him not having any proof in form of board resolution showing when production should have commenced. PW3 admitted that the matters deposed to in his witness statement are beyond his level of apprehension and that that being the case he had no way of knowing the agreement between the Plaintiff and the Defendant regarding the generator set. PW3 stated that the Defendant was a shareholder of Pekahiah Enterprises Limited and that the company is still a going concern.

Further that the chief gave land to the Wabituo community and Pekaiah Enterprises Limited and that the said company had no role to play in the 250 hectares of land given to Wabituo community.

When referred to page 22 of the Defendant's bundle of documents, PW3 admitted that the land in question does not belong to the Plaintiff. PW3 stated he was not aware that the Plaintiff gave shares to Pekaiah Enterprises Limited in the sand mining project and that the Defendant and Brian Mulopu signed the transfer of shares but that the duo hid the documents. PW3 stated that William Mbimbi was the Chief Executive Officer of Pekaiah Enterprises Limited and when referred to page 2 of the Plaintiff's supplementary bundle of documents and asked as to who signed a letter with the company letter head, he responded that he did not know anything about the said document.

PW3 stated that he was present when the generator set was being picked from the 1<sup>st</sup> Defendant's place. That he did not what the Plaintiff's claims were.

With those witnesses, the Plaintiff closed its case.

The defence witnesses filed in witness statements but there was no appearance of the said witnesses at trial. Nonetheless I will proceed to consider their statements as part of the defence.

The salient facts in the witness statement dated 8<sup>th</sup> December, 2015, by Jacob S. Kyembe, an Induna in the Ibaloli Royal Establishment of Senior Chief Mukumbi is that he was making a statement on behalf and under the authority of Chief Mukumbi. That the Chief on or about 25<sup>th</sup> March, 2002 authorised Musazhoka Sand Mines to mine sand within his chieftdom as evidenced by a letter at page 1 of the Defendant's bundle of documents. According to the witness, the Chief granted 250 hectares of land known as Farm No.31513 to the Wabituo community sand mining in the Wabituo area after which Solwezi Municipal Council recommended Wabituo to Ministry of Lands for issuance of a Certificate of Title. (Pages 2, 5 and 6 of the Defendant's bundle of documents). In conclusion, he stated that Farm No.31513 was not given to Pekahiah Enterprises Limited but to the Wabituo community and that there is no record at Solwezi Municipal Council showing that



Pekahiah Enterprises Limited was allocated the land (pages 22 and 32 of the Defendant's bundle of documents).

Luka Samuhanga the Defendant filed a witness statement on 8<sup>th</sup> December, 2015 in which he testified that he is a non-executive director in the Plaintiff Company who is ordinarily supposed to represent Wabituo community which has now been incorporated as Wabituo Construction Materials Limited. He stated that on 17<sup>th</sup> July, 2015 Justice. N. Mutuna ordered that the generator be delivered up to the Plaintiff and that soon after the Order, the Plaintiff's servants went to his property to collect the generator set. That the generator set together with other assets belonging to the Plaintiff were being stored at his place as the Plaintiff did not have a storage place and that he had built a secure storage for the Plaintiff's heavy-duty industrial generator set and paid people to guard it at night.

He stated that a meeting to discuss the location of the generator set was called for but that Lubilo Mate a director in the Plaintiff Company rebuffed the calls and ordered the release of the generator set without a formal request. That the said Lubilo Mate repeatedly

trespassed on his property and harassed his family by demanding for the release of the generator set in his absence until he lodged a complaint through Counsel to the Officer-in-Charge at Maheba Police Station. In respect to the Plaintiff's claim for loss of business he stated that the Plaintiff did not pray for special damages neither has it provided a quantifiable basis demonstrating what money it was making on a daily basis to substantiate its claim. He attributed the hostility between the Plaintiff and himself as a result of the disregard of the agreements between the parties in regard to the surrender of 250 hectares by the Wabituo community to the Plaintiff in order for it to access financing from Norsad Finance Limited and Grofin Africa Fund Zambia Limited. That Lubilo Mate intimated to him and Brian Mulopu that Norsad had given him a seven (7) days ultimatum within which to surrender the Certificate of Title and finalise all documents, failure to which the financier would withdraw from the arrangement. That based on the foregoing, it was decided to allow Farm No.31513 to be registered in the Plaintiff's name and that a Trust was created over the said land whereby it was agreed that repayment of the loan acquired from

Norsad would revert to the Wabituo community (pages 17 and 18 of the Defendant's bundle of documents).

He further stated that Lubilo Mate and Jackson Kungo in perpetration of fraudulent conduct, caused a Deed of Participation date 5<sup>th</sup> December, 2013 at page 8 of the Plaintiff's bundle of documents to be executed where they sought to oust and contradict the affidavit sworn at page 18 of the Defendant's bundle of documents. That the said Deed misrepresents and fraudulently casts Pekahiah Enterprises Limited as the owner of Farm No.31513. Further that, the members of Wabituo community have been sidelined from the management of the Plaintiff and are not privy to its operations hence they do not know whether the loans repayments are being effected to the lenders Norsad and Grofin. That it then became necessary and reasonable for the community to call for a meeting of all stakeholders before releasing the generator set.

He went on to state that he is a Director in the Plaintiff Company and at no time was a resolution passed by the said Company to take out legal action against him and that only two board meetings



have been called by the Company since the sand mining venture commenced. That the Plaintiff Company was sued under Cause 2014/HPC/0356 for an unpaid debt amounting to ZMW273, 057.77 (page 33 of the Defendant's bundle of documents). Further that, the Plaintiff by not involving him in his capacity as a representative of the community, is in breach of the resulting Trust of 30<sup>th</sup> August, 2013 where the undertaking of the parties was to work together. Finally, that based on the foregoing, his counterclaim ought to succeed and the Plaintiff's claim must fail.

Brian Mulopu DW2 in his witness statement filed on 13<sup>th</sup> January, 2016 testified that he is a non-executive Director in the Plaintiff Company where he represents the interests of the Wabituo community. That the leaders of the Wabituo community had an agreement with Pekahiah Enterprises Limited to sign agreements or documents in the company's name as evidenced by a resolution (page 1-3 of the Defendant' supplementary bundle of documents). That the Defendant and himself have never been directors in Pekahiah Enterprises Limited neither have they been signatories to any of its accounts. Further that, the Defendant and his signature

appear on several documents showing that they executed the same on behalf of Pekahiah Enterprises Limited due to the decision by Edwin Mbimbi to change papers into the company name instead of Wabituo. That despite the Plaintiff's claim for loss of business it has never paid the Defendant for the safe custody of the generator set as evidenced by page 2 of the Defendant's supplementary bundle of documents).

That marked the end of trial.

In its skeleton arguments dated 8<sup>th</sup> December 2015, Counsel for the Plaintiff referred to the case of **Attorney-General v Sam Amos Mumba**<sup>1</sup> where it was held that:

*"Where loss of business forms part of the claim, it must be pleaded as special damages and strictly proved."*

It is submitted that the claim for loss of business of K80,000 per day has no basis nor is it supported by empirical evidence. Further that the claim for loss of business ought to have been pleaded as special damages and must therefore fail. The case of **Attorney-General v D.G Mpundu**<sup>2</sup> was cited on the particularisation of special damages. The Defendant submitted that the Plaintiff's claim

for damages for inconvenience is founded on tort and cited the learned authors **McGregor on Damage (1972) 13<sup>th</sup> Edition, Sweet and Maxwell, London** at page 41.

The Defendant submitted that it demonstrated that the Plaintiff holds Farm Number 31513, Solwezi on resulting trust for Wabituo community through its trustees and as such a declaration is accordingly sought to the effect that the said Farm shall revert to the Defendant after the Plaintiff discharges its indebtedness to Norsad Limited of Botswana and Grofin Africa Fund Zambia Limited. The case of **Re Vanderveill Trust (No 2) [1974] 1 ALL E R 41<sup>3</sup>** was cited in respect to the proposition that the settlor in a trust did not intend to part with beneficial ownership of the property. That as such the said farm does not belong to the Plaintiff but the same is holding it in trust for the Defendants who are trustees of the Wabituo community.

In its skeleton arguments in reply to the Defendant's submission, Counsel for the Plaintiff argues that it was inconvenienced in its business as contained in paragraph 5-13 of its statement of claim and pages 14 and 15 of the Plaintiff's bundle of pleadings. The



Court was referred to the definition of "nuisance" in **Black's Law Dictionary 9<sup>th</sup> Edition, Thomson Reuters** which denotes the action causing interference rather than the resulting condition. That the Defendant's conduct to wrongfully detain the Plaintiff's generator set amounted to the commission of a nuisance or interference. The Plaintiff denies that a resulting trust cannot be created with a non existing entity at law and relied on the case of **Re Vandervell's Trusts (No 2) [1974] 1 ALL E R 41<sup>3</sup>** alluded to in the Defendant's submissions. That the Defendant has made unsubstantiated claims that Pekahiah was an illegitimate actor in the land alienation and community partnership processes between Wabituo community and the Plaintiff. That in fact the Defendant was signatory on behalf of Pekahiah on the agreements that enacted these very same land alienation and community partnership agreements between Wabituo community and the Plaintiff. That the Defendant's counterclaim should fail as it is unsubstantiated as the Defendant has failed to show that the current model via the Deed of Participation is disadvantageous to any stakeholder apart from the Defendant's own narrow self-interests.

I have considered the Plaintiff's claim and the counterclaim by the Defendant. I have considered the evidence on record, the authorities cited and the written submissions filed on behalf of the parties.

From a perusal of the pleadings and evidence, it is common cause that the Plaintiff and the Wabituo community entered into an Agreement in which the community's land known as Farm No.31513 Solwezi was to be registered in the Plaintiff's name for purposes of securing a loan facility. It is not in dispute that the Plaintiff owns a 250 KVA Baifa Diesel generator set Model No.BF-275DS amongst other equipment which was stored at the Defendant's place. That the said generator set was released and is now in the Plaintiff's custody following an Order of my Learned Brother Justice. N. Mutuna. Following delivery and return of the generator set, the dispute centres around the issues of damages in respect to the Plaintiff's loss of business and inconvenience caused, and the Defendant's counterclaim.

It is trite that he who alleges must prove as guided by the Supreme Court in the case of **Masauso Zulu v Avondale Housing Limited**<sup>4</sup>. The learned authors of **Phipson on Evidence 17<sup>th</sup> Edition**

**((Thomson Reuters Legal) Limited, 2010)** in paragraph 6 – 06 at page 151 state the following regarding the burden of proof in civil cases:

*“So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantively asserts the affirmative of the issue. If, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him. It is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons.”*

### **Damages for loss of business**

The Plaintiff claims damages for loss of business and the onus is therefore on the Plaintiff to prove this. It is trite that the loss should not be too remote and the consequences are of such a kind that they were, or ought to have been, in the contemplation of the parties at the time of making the agreement as being of a very substantial degree of probability. The Supreme Court in the case of the **Attorney-General v Sam Amos Mumba (1984) Z.R. 14 (S.C.)**<sup>1</sup> cited by Counsel for the Plaintiff, held that:



*“Where loss of business forms part of the claim, it must be pleaded as special damages and strictly proved.”*

This principle is further expounded and articulated in the case of **Andrew Tony Mutale v Crushed Stones Sales Limited (1994) S.J. 98 (SC)**<sup>5</sup> where it states that special damages must be specifically pleaded and proved. I adopt these legal principles and position as my own.

The Plaintiff alleged that during the period that it was prevented from collecting the generator set, it suffered loss of income of ZMW80,000 per day from 6<sup>th</sup> June, 2015 being the date when it was scheduled to commence operations. I find that the Plaintiff has not led evidence to substantiate their claim. In fact PW1 admitted that the Plaintiff has not explained how the claim for loss of income arises, although he insisted that the tax invoices produced on pages 63 to 66 of the Plaintiff's bundle of documents gives the Court a general picture of the income the Plaintiff should have generated had it had access to the generator. A cursory perusal of the said invoices shows that they are dated 27<sup>th</sup> October, 2015 and PW1 in his evidence told Court that the generator set was released

sometime around 23<sup>rd</sup> July 2015 and that business was supposed to have commenced on 6<sup>th</sup> June, 2015. I find no supporting evidence to support PW1's assertion as to when the business was to have commenced nor has the Plaintiff shown how it arrived at its projections of ZMW80,000 per day. I find that the evidence led by PW1 on the invoices does not reflect the Plaintiff's trading pattern to show the loss it alleges to have suffered between 6<sup>th</sup> June and 23<sup>rd</sup> July 2015. In this regard, it is not the duty of this Court to aid the Plaintiff and act on speculations. In the absence of supporting evidence, the Plaintiff's claim for loss of business is without merit. The proof required in the claim for loss of business is strict and in this case it has not been proved and as such I find that the Plaintiff's claim for damages for loss of business is devoid of merit and fails.

### **Damages for inconvenience**

In respect to the claim for damages for inconvenience, the Plaintiff claimed it was inconvenienced by the Defendant's failure to release the generator set and other equipment resulting in the delayed commencement of business. The Defendant refuted this assertion

and stated that it held on to the generator set as the Plaintiff intended to remove it in his absence. In its submissions, Counsel for the Plaintiff quotes from **Black's Law Dictionary 9<sup>th</sup> Edition** where the word "nuisance" is defined as:

*"loosely, an act or failure to act resulting in an interference with the use or enjoyment of property. In this sense the term denotes the action causing interference, rather than the resulting condition."*

The evidence on record reveals that the generator set was handed over to the Plaintiff on 23<sup>rd</sup> July 2015. I refer to the Supreme Court case of **Attorney-General v Mpundu** where awards of damages for inconvenience were made, and in that case, the damages were not considered, simply because the breach of any contract is inconvenient to the Plaintiff. In the case of inconvenience, damages have normally related to substantial physical or personal inconvenience or discomfort. In the case of **Miyanda v Attorney-General**<sup>6</sup>, the Supreme Court cautioned as follows:

*"Of course, these damages should not be awarded unless the distress, hardship or inconvenience, as the*



*case may be, results from some act, or omission on the part of the defendant - (either in his conduct or in the manner of effecting the wrongful breach or if such result must have been in the contemplation of the parties as likely to bring about undue suffering) - which does occasion suffering which goes beyond the normal consequences of a wrongful breach."*

From my understanding, there is evidence that the generator set and other equipment were kept for safe keeping by the Defendant. This was confirmed by the Plaintiff, Defendant and DW2. From what I discern from the pleadings and evidence, the Defendant did not unilaterally take custody of the generator set. The generator set was taken to the Defendant's premises for safe custody. The issue that arises is whether or not the Defendant prior to the granting of the mandatory injunction, unlawfully kept the generator set longer than agreed. It is the Defendant's evidence that in his absence, the Plaintiff through PW1 demanded for the generator set. This position was confirmed by PW1 and PW2. I find that the generator set was only released to the Plaintiff after a Court order. It is

apparent that arising from the Defendant's conduct and failure to release the generator set, it resulted in a lack of use of the generator set. It is the Defendant's evidence that the generator set could not be released to Lubilo Mate a director in the Plaintiff Company before an agreement was reached between the parties, and that Lubilo Mate refused to meet the Defendant. Conversely, the Defendant argues that he did not refuse to release the generator set but set a precondition for the parties herein to agree as to where the generator set would be located as well as an agreement regarding the benefits to be derived by the Wabituo community. There is no evidence on record to suggest that when the generator set was taken to the Defendant for safe custody, its release was subject to any conditions. I find that the Plaintiff requested for its use which was denied by the Defendant resulting in the interference with the use or enjoyment of the generator set. I opine that the inconvenience arose from the time that the Plaintiff requested for the generator set up to the time it was handed over by way of the mandatory injunction. I find that the Plaintiff has proved that it suffered inconvenience and I award damages to be assessed by the Registrar.

## **Counterclaim**

In the counterclaim, the Defendant seeks a declaration that the Plaintiff is a lessee of Farm No. 31513 on resulting trust for the Wabituo community through its trustees to which it shall revert after discharging its indebtedness to Norsad Finance Limited of Botswana and Grofin Africa Fund Zambia Limited. The Defendant further seek a declaration that Farm 31513 is held by the Plaintiff on trust for the Wabituo community as beneficial owners. The two claims are similar and shall be dealt with together.

It is trite that the Court has the power to make a declaratory judgment and this power is discretionary and must be exercised judiciously. A declaratory relief cannot be demanded by a party as of right. Declarations are usually granted in the most deserving of cases and they must not be granted where they will not serve any useful purpose or where they are of no practical consequence as espoused by the Supreme Court in the case of **Communications Authority v Vodacom Zambia Limited (2009) ZR 1967<sup>7</sup>**.

PW1 testified that the Chief allocated land to the community who co-opted Pekaiah Enterprises Limited on the basis that it is an



incorporated legal entity, and the community then requested that the Plaintiff gives 15% of the shares to Pekaiah Enterprises Limited. PW1 testified that the owners of Pekaiah Enterprises Limited are from within the Wabituo community. In terms of the legal ownership of the 250 hectares, PW1 testified that the land belongs to the Wabituo community. In cross examination, PW1 concurred that the Defendant and Brian Mulopu are also members of Wabituo community. PW1 further stated that the Chief disowned Pekaiah Enterprises Limited. In re-examination, PW1 testified that the Wabituo community is not a legal entity but a collection of people settled around 17 villages. That the community appointed persons to represent their interests namely Luka Samuhanga and Brian Mulopu, Eddy Mbimbi and William Bimbi. He explained that the land in question was given to the Wabituo community by the Chief to 5 headmen namely Mr. Samuel Mbimbi, Mr. Samuwena, Mr. Albert Museneni and Mr. Jonas Fundamukamwa. PW2 testified that Luka Samuhanga is a shareholder in Pehakiah Enterprises Limited. According to PW2 the 250 hectares belongs to Wabituo community. This position is confirmed by Jacob S Kyembe an Induna in the Ibaloli Royal Establishment of Senior Chief Mukumbi.

From an evaluation of the evidence on record, it is apparent that 250 hectares was allocated to the Wabituo community by the Chief. Later, the 250 hectares was surrendered to the Plaintiff to facilitate their access to financing. In cross examination, Counsel for the Defendant raised the issue that the Chief denied ever allocating land to Olibul and did not know who was behind Pekaiah Enterprises Limited. In determining ownership and conditions of reversion of Farm 31513 to Wabituo community, I find that the land was alienated to Wabituo community according to a letter from Solwezi Municipal Council dated 16<sup>th</sup> August 2012 (page 3 of the Defendant's bundle of documents). There is an application for conversion of customary tenure into leasehold tenure dated 8<sup>th</sup> October 2013 by Wabituo community sand mine. The bone of contention by the Defendant is that the Wabituo community has a beneficial interest in Farm 31513. The other contention is that Pekaiah Enterprises Limited does not represent the interests of the Wabituo community and that it fraudulently transferred title to the Plaintiff.

I have examined the copy of the Certificate of Title No 252450 exhibited herein and it indicates that Farm 31513, Solwezi is registered in the name of the Plaintiff and represents 250.000 hectares as described on Diagram No 6681 of 2013 (page 51 Plaintiff's bundle of documents). Instructive is Section 33 of the **Lands and Deeds Registry Act, Cap 85 of the Laws of Zambia** which provides that a Certificate of Title is conclusive evidence of ownership of land. The Supreme Court in the case of **Anti-Corruption Commission vs Barnett Development Corporation Limited**<sup>8</sup> stated as follows:

*“Under section 33 of the Lands and Deeds Registry Act, a certificate of title is conclusive evidence of ownership of land by a holder of a Certificate of title. However, under Section 34 of the same Act, a certificate of title can be challenged and cancelled for fraud or reason of impropriety in its acquisition.”*

Applying the facts to the law, although Counsel for the Defendant did allude to alleged fraudulent conduct on the part of the Plaintiff in securing the 250 hectares from Wabituo community, the same is not specifically pleaded. The Defendant seeks to rely on an



Agreement dated 30<sup>th</sup> August 2013 executed by the Plaintiff and the Wabituo community represented by Luka Samuhanga and Brian Mulope where there was a recognition that the Plaintiff was not the owner of Farm 31513, Solwezi (page 18 of the Defendant's bundle of documents). However, this document is superseded by the Deed of Participation dated 5<sup>th</sup> December 2013 which I find is the primary document that governs this transaction between Wabituo community and the Plaintiff. I concur that the said Agreement was superseded by virtue of Clause 14 of the Deed of Participation which states as follows:

*"14. This Agreement constitutes the whole agreement between the parties and shall replace and supersede all prior agreements whether verbal or written between the Parties, including for avoidance of doubt replacing and superseding the "Affidavit in Support of Agreement between Wabituo and Olibul Investment dated August 30<sup>th</sup> 2013 and the "Agreement between Wabituo and Olibul Investment" dated August 30<sup>th</sup> 2013."*

PW2 testified that the purpose of the Deed of Participation was for the Wabituo community and the benefits it would accrue. He further testified that Pekahiah Enterprises Limited was used as a Special Purpose Vehicle for the purpose of facilitating the partnership with the community and on a reciprocal basis assigning shareholding within the Plaintiff company.

I find that the Certificate of Title relating to Farm 31513, Solwezi is duly registered to Olibul Investments Limited, and the date of registration is 25<sup>th</sup> September 2013. (Page 52 of the Plaintiff's bundle of documents). This status of ownership is further confirmed by the Deed of Participation executed by the Plaintiff, Pekahiah Enterprises Limited, and Hezron Salungu, wherein clause 7.4 and 8.3 stipulates as follows:

*"7.4 All parties understand that title conveys ownership of property, that a title deed is an instrument of ownership, and that the holder of a title deed is the legal owner of a property. The Parties deemed it necessary for Olibul to possess such rights as the legal owner holding title to Farm No 31513 Solwezi, in order to successfully obtain*

*financing of Olibul from NORSAD and Grofin which the Parties deemed necessary to realise the Commercial Purpose and Social Purpose.*

*7.5 Following Olibul's full and complete loan repayment to NORSAD and Grofin, the following release of any Security Interest over the Wabituo Sand Deposits by NORSAD and Grofin, following release of all obligations to NORSAD and GroFin arising in connection with Olibul's debt and equity financing agreements (including but not limited to documentation and agreements pertaining to the Security Interest) and upon receiving GroFin's written permission (if GroFin's remains a shareholder in Olibul after repayment of the GroFin loan). If Olibul still retains the title to Farm 31513, Olibul will offer to transfer the title to Farm 31513 to Pekahiah. Such offer is subject to a) Pekahiah's continued faithful representation of Wabituo community's broad-based social interests and b) Pekahiah's good stewardship of Community Development Initiatives and the Social Purpose, and is subject to the Parties entering*



*into written agreement setting out a transfer structure that is a) is consistent with furthering the Social Purpose, b) ensures clear compliance with all applicable law, and c) sets out a clear mutually agreed structure for the payment of any applicable fees or taxes arising from such transfer, including for the avoidance of doubt pertaining to the payment of property transfer tax that may be payable in connection with such a title deed transfer."*

*"8.3 To enable Olibul to meet NORSAD and Grofin*

*requirements, in connection with financing deemed necessary by the Parties to successfully pursue the commercial and social purposes, all parties and stakeholders agreed that Olibul shall possess the 99 year lease and title for Farm 31513 Solwezi, and agree for the Mining Rights and Environmental Rights associated with pursuit of the Commercial purpose be transferred to and reside with Olibul.*

*8.5 Possession of Title Deeds year lease, Mining Rights and Environmental Rights shall reside with Olibul until at least*

*such time as Olibul may be released from all obligations to NOR SAD and Grofin arising in connection with the capitalisation of Olibul and until at least such time as the potential transfer of the title deed from Olibul to Pekahiah as contemplated in Clause 7.5 and as subject to the terms of this Agreement may be realised. If such transfer as contemplated in Clause 7.5 is realised, Olibul shall nonetheless retain the Mining Rights and Environmental Rights to enable its continued pursuit of the Commercial Purpose and its associated support of the Social Purpose, unless the parties reach written agreement otherwise regarding such Mining Rights and Environmental Rights."*

I find as a fact that the intention of the parties is clear in that the Plaintiff shall possess the 99 year lease and title to Farm 31513 Solwezi until such a time it is released from its obligations to NOR SAD and Grofin, and subject to the fulfilment of the conditions set out by the Plaintiff for Pekahiah Enterprises Limited in clause 7.5, 8.3 and 8.5 of the Deed of Participation. According to the

recitals, it identifies the Plaintiff herein as the title holder of Farm 31513, Solwezi District, and that the farm is located in the Wabituo community. In light of the foregoing I am satisfied that the Plaintiff is the registered owner of Farm 31513 Solwezi District as the Certificate of Title is conclusive evidence of ownership. The consequential issue is whether the Plaintiff holds the said land in trust for the Defendant and Wabituo community as beneficial owners. Counsel for the Plaintiff argues that a resulting trust cannot be created with a non-existent entity at law as the Defendant herein has no capacity or locus standi to make such a counterclaim against the Plaintiff as they do not represent the interests of the Wabituo Community in the proceedings. Conversely, Counsel for the Defendant argues that a resulting trust was created and in support of this proposition cites the case of **Vandervell's Trust [No 2] [1974] 1 ALL E R 47<sup>3</sup>** which held that trust comes through the operation of law. That the Plaintiff did not provide any valuable consideration and that equity presumes a bargain and never a gift. The question then is, in what capacity is the Defendant sued? According to the amended statement of claim, the Defendant is described as follows:



*"2. The defendant (Luka Samuhanga) serves as a non executive director on the board of the Plaintiff representing the interests of Wabituo Community while the rest of the defendants are his family members who include inter alia Saul Samuhanga and Richard Samuhanga.*

In paragraph 1 of the amended defence it reads as follows:

*"1. Paragraphs 1 and 2 of the statement of claim are admitted save that Luka Samuhanga and one Brian Mulopu sit on the board of the Plaintiff as trustees of the Wabituo Community which has now incorporated itself as Wabituo Construction Materials Limited."*

Going by the statement of claim, the Defendant is sued in his capacity as a non-executive director in the Plaintiff Company who is representing the interests of Wabituo community. According to the Agreement for transfer of shares between Olibul and Pekaiah Enterprises Limited, Clause 4 states that Pekaiah represents the broad based social development interests of the Wabituo community. This Agreement for transfer of shares is signed by Brian Mulope and the Defendant Luka Samuhanga, Eddie Mbimbi

and Douglas Muluka on behalf of Pekahiah Enterprises and Lubilo Mate and Jackson Kungo on behalf of the Plaintiff herein. Having found that the Plaintiff holds the legal title to the subject property, I find that Pekahiah Enterprises Limited oversee the interests of Wabituo community and hold equitable title to the subject property. I opine that the Defendant cannot seek a declaration that Farm 31513 is held by the Plaintiff on trust for the Defendant and Wabituo Community as beneficial owners as the interests of Wabituo community are held by Pekahiah Enterprises Limited. This counterclaim fails.

The next issue as argued by Counsel for the Defendants, is whether there is a resulting trust. In establishing whether there is a resulting trust, it is imperative to examine the intentions of the parties herein. I will begin by defining a trust. According to the learned authors Alastair **Hudson "Equity and Trusts" 3<sup>rd</sup> Edition, Cavendish Publishing Limited, 2003** at page 299, it defines a trust as follows:

*"A trust is created where the absolute owner of property (the settlor) passes the legal title in that property to a person (the*

*trustee) to hold that property on trust for the benefit of another person (the beneficiary) in accordance with terms set out by the settlor."*

It is trite that to create a valid trust, the terms of the trust must be sufficiently certain. According to the case of **Knight v Knight [1840] 3 Bev 148<sup>9</sup>**, the Court will look at the certainty of intention to create a trust, certainty of the identity of the subject matter comprising the trust fund and the certainty of the beneficiaries or objects of the fund. A resulting trust arises in the absence of an express declaration where a person holds legal title in circumstances where they cannot be taken to have full equitable ownership. It also arises in order to recognise the equitable proprietary rights of someone who has contributed to the purchase price of property with an intention that the person takes some property rights in that property. In the case of **Re Vandervell's Trust No 2 [1974] 1 ALL E R 47<sup>3</sup>**, cited by Counsel for the Defendants, it identified two categories of resulting trusts, namely an automatic trust and a presumed resulting trust. Both give effect to the intention or presumed intention of the parties. There is



wisdom to be drawn from Lord Brown Wilkinson in the case of **Westdeutsche Landesbank Girocentrale v Islington LBC [1996] 2 WLR 802**<sup>10</sup> where it gives effect to the intention or presumed intention of the parties. From the evidence on record, it is apparent that a resulting trust was created by Wabituo community through Pehakiah Enterprises Limited a corporate entity as its trustees. In the present case, I find that Pehakiah Enterprises Limited is the trustee and not the Defendant herein.

A further perusal of the documentary evidence shows a Shareholders' Agreement dated 13<sup>th</sup> March 2014 between Jackson Kungo, Lubilo Mate, Pehakiah Enterprises Limited, Grofin Africa Fund Zambia Limited and Olibul Investments Limited. The said Agreement reveals that the land was to be registered in the Plaintiff's name merely for purposes of accessing financial assistance from Norsad and that title is to revert to the Wabituo community upon repayment of the said loan by the Plaintiff. In my considered view, and I concur with Counsel for the Defendant that from the intention of the parties, a resulting trust was formed wherein the settlor retains a beneficial interest in the trust

property. I declare that the Plaintiff holds the land in trust of the Wabituo community (pages 17, 18 and 19 of the Defendant's bundle of documents).

### **Conveyance of Farm 31513**

The Defendant seeks an Order that the Plaintiff do execute and deliver to the Defendant a conveyance of Farm 31513 Solwezi into the Defendant or Wabituo community now incorporated as Wabituo Construction Materials Limited upon its indebtedness being discharged with Norsad and Grofin. It is apparent that there is a power struggle between Pekaiah Enterprises Limited and Wabituo Construction and Materials Limited parties as to who represents the Wabituo community between. I opine that this counterclaim contradicts the contents of the Shareholders Agreement and Deed of Participation whose intentions by the parties are clear in that the equitable interest in Farm No.31513, Solwezi is to be held by Pekaiah Enterprises Limited and not the Defendant. This counterclaim is without merit and fails.

### **Rectification of shareholding and apportionment of executive functions**

The Defendant counterclaims for an Order directing the Plaintiff Company to rectify its shareholding structure by allotting and or transferring shares in the Plaintiff to the Defendant Luka Samuhanga and Brian Mulopu to hold in trust for the Wabituo community. The Defendant further counterclaims an Order for the Plaintiff and its Managing Director to apportion executive functions and or allow participation in the day-to-day operations of the Plaintiff to the Defendant and Brian Mulopu. I will deal with the two counterclaims simultaneously as they are intertwined. DW1 testified that it was agreed that upon Farm No.31513, Solwezi being registered in the Plaintiff's name, shares would be allotted to the Defendant and Brian Mulopu in the Plaintiff Company, and that the duo would receive dividends in trust for the Wabituo community. I am guided by the provisions of Clause 5.1 of the Deed of Participation that states as follows:

*"5.1 Pekahiah shall have a board representative on the Olibul board of directors. The first Pekahiah representative on Olibul board of directors shall be either Luka Samuhanga*



*or Brian Mulope, not both, as shall be duly notified by  
Pekahiah."*

In the recitals to the Deed of Participation, recital 5 states as follows:

*"5. Pekahiah is lead by members of Wabituo community, is a shareholder in Olibul and holds 15% of the total issued share capital of Olibul, having received shares in Olibul in connection with Pekahiah's mandate from Wabituo Community to further the Social Purpose pursuant to the terms of this Agreement."*

In line with the intention of the parties, the Agreement for the transfer of shares between the Plaintiff and Pekahiah Enterprises Limited dated 17<sup>th</sup> September 2012, has been superseded by the Deed of Participation as clearly expressed in Clause 15 of the said Deed. In this respect, the Plaintiff's assertion that the shareholders of Pekahiah Enterprises Limited are representatives of the community hold true. I have perused the PACRA form (page 23 of the Defendant's bundle of documents) which reveal that Pekahiah Enterprises Limited holds 12,000 ordinary shares in the Plaintiff

Company as at 4<sup>th</sup> April 2014. In accordance with Clause 5.1 of the Deed of Participation, it does not state that the Plaintiff is to allot 15% shares to Luka Samuhanga as a shareholder but as a director to sit on the Plaintiff board of directors. I opine that Clause 5.1 cited aforesaid empowers Pekahiah Enterprises Limited to appoint any other person following the initial appointment of either Luka Samuhanga or Brian Mulope onto the Plaintiff's board of directors. The counterclaim is without merit.

In terms of the apportionment of executive functions or participation in the day to day operations of the Plaintiff to the Defendant and Brian Mulopu, I opine that the Shareholders Agreement governs the relationship between the shareholders and the Plaintiff. Clause 18 in the Shareholders Agreement provides for Management of the Plaintiff Company. The Executive Managers perform such duties as delegated to them by the Board. The Executive Managers are listed in Part 1 of Schedule 2. I see no basis to order the Plaintiff to apportion executive functions to the Defendant as matters of appointment are done by the board in accordance with the provisions of the Shareholders Agreement and

Articles of Association. However, the Court has had no sight of the Articles of Association which may have shed more light on modus operandi of appointment of executive directors. This counterclaim fails.

### **Rectification of Certificate of Title**

The Defendant counterclaims an Order that the Plaintiff do execute and deliver to the Defendant a conveyance of Farm 31513 into the Defendant and/or Wabituo Community's now incorporated entity called Wabituo Construction Materials Limited upon its indebtedness being discharged with Norsad and Grofin. Further and/or in the alternative, an order for rectification of Certificate of Title of Farm No.31513 to reflect the Defendant and/or Wabituo Construction Materials Limited as lessee for the residue of a term of 99 years in trust for the Wabituo Community. Arising from my earlier finding that the Plaintiff is the legal owner and that there is a resulting trust for the Wabituo community, I find that there is no aorta of evidence to suggest any agreement that the intention of the parties is to have Wabituo Construction Materials Limited as lessee. I have observed that Wabituo Construction Materials Limited was



incorporated in 2014 after the signing of the Deed of Participation and Shareholders Agreement in December 2013 of which the Defendant was privy to. I find that the Defendant is acting in bad faith under the guise of representing the interest of Wabituo community. I say so as the Defendant Luka Samuhanga even appended his signature to the Agreement for the transfer of shares and did so on behalf of Pekahiah Enterprises Limited. In my considered view, the mere fact that the Defendant Luka Samuhanga feels that he is not benefitting from the partnership between the Plaintiff herein and Pekahiah Enterprises Limited does not in any way invalidate the Agreements between the parties. I opine that the Certificate of Title cannot reflect the Defendant's names as this would be contrary to the intention of the parties as stipulated in the Deed of Participation and Shareholders Agreement. In the circumstances of the case, the counterclaim lacks merit and is dismissed.

### **Damages**

The Defendant counterclaims for damages arising from the alleged actions of the failure of the Plaintiff to transfer shares to the

Defendant Luka Samuhanga and Brian Mulopu as trustees of the Wabituo Community. Further that as non-executive directors, the Defendant and Brian Mulopu have been unable to participate in the affairs of the Plaintiff on behalf of the Wabituo Community despite having agreed to the registration of 250 hectares of the community in the Plaintiff's names. That as a consequence, the Defendants have suffered loss and damage. I find that the Defendant abandoned this claim as it was not canvassed beyond the pleadings. This counterclaim fails.

On a balance of probabilities, I find that the Plaintiff has only proved the claim for damages for inconvenience which damages are to be assessed by the Registrar. The Plaintiff's other claims fail.

In terms of the counterclaim, and for the avoidance of doubt, it is hereby declared that the Plaintiff is lessee of Farm 31513, Solwezi in resulting trust for the Wabituo community as its beneficial owners through Pekaiah Enterprises Limited subject to the conditions set out in the existing Deed of Participation and Shareholders Agreement.

In the circumstances of the case, each party to bear its legal costs.

Leave to appeal is hereby granted.

Delivered at Lusaka this 20<sup>th</sup> day of March, 2018 at Lusaka.



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**HON IRENE ZEKO MBEWE**  
**HIGH COURT JUDGE**