



REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CASE NO. 257 OF 2016

**BETWEEN**

CHARLES KAPONDA.....CLAIMANT

**AND**

BLANTYRE CITY COUNCIL.....1<sup>st</sup> DEFENDANT

THE REGISTERED TRUSTEES OF MALAWI ASSEMBLIES

OF GOD (NAMILANGO CHURCH).....2<sup>nd</sup> DEFENDANT

Coram: **WYSON CHAMDIMBA NKHATA (SRM)**

Tandwe- of Counsel for the Claimant

Chitsulo- Court Clerk and Official Interpreter

**ORDER ON ASSESSMENT OF DAMAGES**

**I. INTRODUCTION**

1. In this matter, I was called upon to assess the damages payable to the claimant arising out of trespass by the 2<sup>nd</sup> defendant upon his plot at South Lunzu (Machinjiri Area 2) plot number SL2/80/50 within the city of Blantyre which he was allocated by the 1<sup>st</sup> Defendant. By his statement of case filed with the court, the claimant claims that after the allocation of the plot, he started developing it. He alleged

that on the 19<sup>th</sup> of July 2015, members of the 2<sup>nd</sup> defendant demolished the site house which he had built on the plot and refilled the dug foundation for his main house and also refilled the pit latrine.

2. By way of originating summons, he sought compensation for trespass. Judgment on liability was entered against both defendants by Honourable Justice Kenyatta Nyirenda on 13<sup>th</sup> December, 2017. On the 2<sup>nd</sup> of March 2018, the 1<sup>st</sup> defendant executed a consent order on damages and costs at the sum of K2, 000, 000.00. This assessment of damages is in respect to the 2<sup>nd</sup> defendant.
3. The assessment proceedings were scheduled on 19<sup>th</sup> of December 2018. The 2<sup>nd</sup> defendant elected not to exercise their rights with respect thereto. They did not attend court on the date appointed for the assessment despite having been duly served with the relevant notice. No reason for the non attendance having been communicated, the court proceeded in the absence of the 2<sup>nd</sup> defendant.

## II. EVIDENCE

1. The plaintiff through his sworn statement testified that he brought this action against the defendant claiming against them several reliefs including damages for trespass with respect to his plot no. SL2/80/50 in Machinjiri Township in Blantyre. The court by its judgment dated 13<sup>th</sup> of December 2017 found that the defendants “committed acts of trespass by their separate acts of demolition of his structures on the plot in dispute” and declared that he was entitled to the reliefs and orders sought in the originating summons.
2. He further averred that on the 19<sup>th</sup> of July 2015, members of the 2<sup>nd</sup> defendant demolished the site house which he built on the plot, refilled the already dug foundation for his main house and also filled up his pit latrine with soil. He spent the sum of K750,000.00 to build the said cite house and pay labour for the digging of the said foundation and the pit latrine and this is the amount he moves the court to award him as well as damages for the actual act of trespass.
3. Such was the uncontroverted evidence proffered for the assessment proceedings.

## III. SUBMISSIONS BY THE PARTIES

1. The assessment is being considered on the basis of skeletal arguments by Counsel for the Claimant filed on the 28<sup>th</sup> November 2018 which he adopted as his final submissions. Therein, he points out that the tort of trespass to land is committed simply by entering upon, remaining upon or placing or projecting any object upon land that is in the possession of another without lawful justification: **Salmond and Heuston on the Law of Torts**, 19th ed (London: Sweet & Maxwell,

1987) 46 (quoted at para 21).

2. He further pointed out that a plaintiff is not required to prove actual damage in order to recover damages for trespass to land but that liability flows from the mere act of trespass. He cites G.H.L. Fridman, Q.C.'s explanation of this principle in **The Law of Torts in Canada**, vol 1 at 7 (Toronto: Carswell, 1989):

Trespass in all its forms is actionable *per se*, i.e., without the need for the plaintiff to prove he has sustained actual damage...[t]he absence of any requirement that damage must be shown before an action will lie is an important hallmark of trespass as contrasted with other torts.

3. But without proof of actual loss or damage, how does a court determine how much to award as damages? One might think damages in such circumstances would be only nominal damages. However, the Alberta Court of Appeal in **Bank of Nova Scotia v Dunphy Leasing Enterprises Ltd.**, 1991 ABCA 351 at paras 60-61 held that a court may decide that damages flowing from a trespass can be more than nominal:

There is no rule of law that restricts an award of damages for trespass to a nominal amount only....Therefore, depending on the circumstances of a given case, a court may determine that an award of damages for trespass should be more than a nominal sum. As explained by A.I. Ogus in **The Law of Damages** (London: Butterworths, 1973) at 23:

Damages for torts actionable *per se* are said to be “at large”, that is to say the Court, taking all the relevant circumstances into account, will reach an intuitive assessment of the loss which it considers the plaintiff has sustained.

4. When does a court award more than a nominal sum for trespass to land when there is no proof of loss or actual damage? In **Webb v Attewell**, 1993 CanLII 6873 (BCCA), Southin J.A. relied upon *Halsbury's*, 4th ed, vol 45, at para 1403 [emphasis added] for an explanation of five different levels of damages. That explanation is as follows (quoted at para 26):

In an action of trespass:

1. If the plaintiff proves the trespass he is entitled to recover *nominal damages*, even if he has not suffered any actual loss.
  2. If the trespass has caused the plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
  3. Where the defendant has made use of the plaintiff's land, the plaintiff is entitled to receive by way of damages such a sum as would reasonably be paid for that use.
  4. Where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the rights of the plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.
  5. If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.
6. It is his contention that the defendant's conduct is thus key to the amount of the damages awarded. If the trespass was accidental or inadvertent, damages are lower. If the trespass was wilful, damages are greater. And if the trespass was in-between the result of the defendant's negligence or indifference then the damages are in-between as well.
7. It is his submission that in the present matter, the trespass by the 2<sup>nd</sup> defendant was wilful and calculated. Thus damages ought to be greater and the circumstances of this case justified an award of not less than K300,000.00.

#### IV. ISSUES

1. The main issue to be determined is what quantum of damages is the Claimant entitled to recover for the trespass and the demolishing of the structures he had on the plot.

#### V. THE LAW ON DAMAGES FOR TRESPASS TO LAND

1. In the Australian text **Remedies, 1** David Wright provided the following commentary:

“The tort of trespass to land is actionable per se. This means that damages can be recovered without proof of loss. This is very different from the tort of negligence which requires loss. ... The purpose of an action in trespass to land is not merely to compensate the plaintiff for damage to land. That action also serves the purpose of vindicating the plaintiff’s right to the exclusive use and occupation of his or her land.<sup>1</sup>

2. And in **Halsbury’s Laws of England**, 4th Ed., Vol. 45(2)2 the law on damages for trespass to land is addressed thus:

“526. Damages. In a claim for trespass, if the claimant proves trespass, he is entitled to recover nominal damages, even if he has not suffered any actual loss. If the trespass has caused the claimant actual damage, he is entitled to receive such an amount as will compensate him for his loss. Where the defendant has made use of the claimant’s land, the claimant is entitled to receive by way of damages such a sum as should reasonably be paid for that use. ... Where the defendant cynically disregards the rights of the claimant in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded if the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.”

3. The fundamental rule on recovery for damage to land is that the owner of the land is entitled to be restored, as far as money can do it, to the position he would have been in had the wrong not been suffered.<sup>2</sup> Put another way, the successful claimant in a trespass action is entitled to that sum of money which will put the party who has been injured or who has suffered, in the same position as he would have been in, if he had not sustained the wrong for which he is now getting compensation or reparation.
4. Where actual physical damage to the land can be proved, the normal measure of damages is the diminution in value of the land as a result of the trespass or the cost of reasonable reinstatement.<sup>3</sup>

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<sup>1</sup>The Federation Press, 2010, page, 48.

<sup>2</sup>Livingston v Rawyards Coal Co(1880) 5 Appeal Cas 25

<sup>3</sup> Ryan v White (2012) Canlii 13805 (NLPC); McGregor on Damages, 12 ed., p. 6

## VI. DISCUSSION

1. In the present case, the claimant is claiming damages for the actual trespass on his plot and also trespass by demolishing his site house and refilling his pit latrine. I shall begin with the latter. The claimant through Counsel seeks an award of K750,000.00 on the same. The difficulty on this regard is the lack of substantive evidence as to how he arrived at the same for instance. The claimant simply pointed out that he spent K750,000.00 to build the site house and pay labour for the digging of the pit latrine. There is no specification on the cost and value of the items used in building of the site house as well as the cost of labour thereto. In my opinion, it is the responsibility of the claimant having alleged damage to his property upon the trespass to assist the assessing court in quantifying the compensation.
2. In the case of **Thornhill Carrington v Tobago House of Assembly**<sup>4</sup>, des Vignes J, when addressing the claimant's entitlement to compensation for damage to his land, stated, "the difficulty that I have in accepting this evidence from the claimant is that he did not produce any documentary or photographic evidence to support these serious allegations. Given these serious allegations of damage, the Court would have expected that the claimant would have sought to adduce evidence from an expert, such as a civil engineer or a soils expert, to confirm the extent of the physical damage to the claimant's land. Further the claimant did not give any evidence of what it would cost to restore his land to its former condition."
3. Since the claimant has not provided sufficient evidence as to the damages to be awarded for the damage to his property on his plot, the initial reaction would be that he should only be awarded nominal damages for the trespass. However, I bear in mind that there was actual loss suffered in this case. I also bear in mind that in the instant case, despite the lack of exactitude by the claimant in calculating and proving his loss consequent on the trespass, it was the defendant who had perpetrated the wrong and for this he was fully responsible. The failure of the claimant to prove the extent of compensation due to him should not allow the defendant to escape with a slight tap on the hands.
4. Thus, in the exercise of the court's responsibility to ensure that the claimant receives reasonable and adequate compensatory damages, in the absence of the requisite evidence, I award the claimant K500,000.00 as damages for trespass in demolishing his site house, foundation and refilling his pit latrine.

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<sup>4</sup> Thornhill Carrington v Tobago House of Assembly CV 2008-02214

5. Turning to the issue of actual trespass, the evidence suggests that the 2<sup>nd</sup> defendant went into the claimant's plot and carried out their wrongful acts of demolishing the structures that they found on claimant's plot and left. I take note that the exercise of assessing damages in this jurisdiction is based on a comparative method, whereby similar injuries and the awards they attracted are looked at and adjustments made to accommodate the injuries in the case at hand, bearing in mind the unique nature of the instant facts before the assessing court. In the case of **Beatrice Kachingwe v Dr. Nga Ntafu** Civil Cause No. 1800 of 1995 (unrep) it was noted as follows:

that damages are also awardable for transitory trespass to the land as was the case in **Blantyre Water board v Makhalira** 11 MLR 121. In that case K50.00 was awarded when water Board officials entered the plaintiff's premise's without authority to wrongfully disconnect water supply thereto. This was in 1984 about 19 years ago. The court notes that since then the value of the Kwacha has depreciated. In the circumstances of the instant case the court considers an award of K5,000.00 to be fair and adequate for the trespass herein.

6. Whilst the above cited authority is not strictly on point with the instant case, I am satisfied that this is an appropriate case for the award of damages for trespass inasmuch as the court takes into consideration the fact the it was decided in the year 1995 about 23 years ago. In the circumstances, I am inclined to make an award of K2,000,000.00 for the actual trespass.

## VII. CONCLUSION

1. It is ordered that the 2<sup>nd</sup> defendant do pay to the claimant -
  - a. damages for trespass in the sum of K2,000,000.00;
  - b. damages for demolishing his site house and refilling his pit latrine in the sum of K500,000.00;
  - c. costs for the assessment proceedings.

MADE IN CHAMBERS THIS 7<sup>th</sup> DAY OF JANUARY 2019

**WYSON CHAMDHIMBA NKHATA**

ASSISTANT REGISTRAR