



IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE No. 2020 OF 2004

*Between:*

BRIAN BURGESS  
AND

PLAINTIFF

CELTEL MALAWI LTD

DEFENDANT

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JUDGMENT

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The plaintiff commenced the present proceedings against the defendant by way of writ of summons claiming damages for trespass, damages for nuisance, interest on the damages at the current bank lending rate and costs of the action.

In terms of the pleadings in the statement of claim, the plaintiff avers that

1. He was at all material times the proprietor and occupier entitled to the possession of the premises situate on Plot No. 12, Zomba Plateau in the town of Zomba.
2. In or about March, 2000 the defendant entered the front garden of the said premises and erected/placed thereon,
  - a) a three metre brick wall surrounding and enclosure of approximately 900 square metres;
  - b) an engine shed with an unsilenced diesel generator and ban of batteries causing a nuisance by way of noise;
  - c) an ESCOM pylon with 3 phase wiring and distribution board which could have been a danger to his property;
  - d) a 55 metre steel girder mast on massive foundations and flashing red lights causing a sore sight;
  - e) two 24 hour Securicor guards for safe-keeping of the enclosure.

The defendant did not comply with the repeated requests by the plaintiff to vacate and deliver the premises until the end of December 2002 when he was forced to do so.

The defence shows that the defendant admits that the plaintiff was at all material times the occupier of Plot No. 12, Zomba Plateau but makes no admission as to the fact that the plaintiff was entitled to the possession of the same. The defendant further denies having wrongfully entered, or trespassed to the plaintiff's

premises, or caused nuisance or occasioned any danger to the plaintiff's property. The defendant states that it occupied the premises which is part of a forest reserve with the licence of the Department of Forestry of the Government of Malawi and the plaintiff's lease with government had expired. The defendant denies all the claims of the plaintiff and in the alternative asserts that if the plaintiff is entitled to any relief, then the same is payable by the Department of Forestry who were paid rentals by the plaintiff during the period the plaintiff occupied part of the property herein.

In reply to the defence the plaintiff denies that his lease had expired and states that the Department of Forestry had no authority to grant a licence to the defendant to occupy the plaintiff's premises.

The court has to determine whether or not the defendant is liable in trespass and nuisance and whether or not the plaintiff is entitled to the damages claimed.

The trial was before the late Honourable Justice Manyungwa and I was assigned to prepare and pronounce the judgment following the sudden demise of His Lordship.

### *Evidence*

Mr. Brian Burgess, testified on his own behalf as and stated that he owns and lives on Zomba Mountain on plot no. 12 and has been living there since 1978 following his retirement from aviation. That he has a stable of 12 horses and some cows. The plot was renewed on 1<sup>st</sup> October 1994. That the Mulunguzi Dam which is very close in proximity was drained and a new dam was built between 1997 and 2001. The plaintiff also adopted his witness statement as part of evidence in chief which contains most of his evidence. The following facts are extracted from the witness statement: that in 1978 the plaintiff was granted a lease by the Malawi Government of 3.02 hectares of property known as Plot No. 12 on Zomba Plateau, which is described in the Deed Registry File No. 80252 and shown on Deed Plan No. 52/70. On 1<sup>st</sup> April 1994 the Malawi Government renewed the said lease for 99 years. The copies of the lease from the Government of 7<sup>th</sup> March 2005 was tendered and marked exhibit P1.

That in around March 2000 the plaintiff noticed that building activity was taking place on his land in front of his premises. At first he thought that it might have been the realignment of the adjacent main road of the mountain, however he advised by a unnamed European who was in charge of the works on the site that he was contracted by the defendant to erect a 55 meter tall mast antenna and buildings. The plaintiff made enquiries and the defendant's General Manager visited the plaintiff and explained that the defendant had on 14<sup>th</sup> February, 2000 obtained a 5 year licence from the Department of Forestry to erect a tower on the best site for an area of 0.02



hectares to relay communication to and from Ku Chawe Inn. This was to be done in the Zomba Forest Reserve.

Following this information the plaintiff advised the said General Manager that their structure was being built on his property/land without his authority. Subsequently the defendant advised him that the said structure was a temporary measure as they were looking for alternative sites and that the defendant would remove the mast before the end of the year 2001 which they did only to re-erect it later on. Employees of the defendant visited the plaintiff and requested him to allow them to continue to occupy his land in consideration of a free cell phone, which offer the plaintiff refuse.

The plaintiff lodged a complaint with the Department of Forestry where he had occasion to view the licence issued by the Department to the defendant which was exhibited and marked BB2. The observation of the plaintiff was that the licence never specified where the defendant could erect their structures in the Zomba Forest Reserve and the plaintiff's plot was not specifically made the subject of the said licence. That the Chief Executive Officer of the defendant undertook to remove their structures on the plaintiff's land as confirmed in letter exhibit marked BB3. The plaintiff sent several invoices to the defendant advising and claiming monthly rentals for wrongful occupation of his land which were exhibits marked BB4, BB5, BB6, BB7 and BB10. In a letter dated 18<sup>th</sup> September 2002, exhibit marked BB8, the advised the plaintiff that they had removed the tower and that arrangements were underway to remove the remaining structures and the plaintiff took time to remind the defendant through a letter exhibit marked BB9 that they were still trespassing on his property. That the defendant removed the remaining structures and vacated the plaintiff's land at the end of December 2002 having occupied it for 33 months. According to the plaintiff the defendant's structures and activities inflicted material injury to the plaintiff's land and constantly caused substantial discomfort and inconvenience on his part for a substantial length of time.

In cross examination the witness stated that before 1978 he was resident at Rathdrum farm by Zomba airfield. He also stated that he knew the previous owners of the plot in issue as Mrs. Conybeare, who owned it before Mr. Hamilton. When the witness was shown an indenture he read paragraph A of it which stated the term of lease as 21 years and paragraph B which stated that it was transferred from Mr Hamilton to Mrs. Conybeare and that page 2 stated that the plaintiff was assigned the unexpired term of the lease which was 21 years, which was up to 1989. The plaintiff stated that he requested Sacranie and Gow to see to the renewal of the lease and the plaintiff got an offer of lease from the Regional Controller of Lands. The stated that when Celtel Malawi came on the land in dispute in the year 2000 he did not have the document marked BB1, the lease, which is dated 7 March 2005. The plaintiff stated that this was done after he had prodded the government. The plaintiff

conceded that the licence contained a sketch plan. The plaintiff also stated that in the invoices for rental charges of USD200 per month in BB5v and BB6 the calculations were not based on prevailing market rates for leases of land but based on the profit that would accrue to the defendant and from newspapers and consultations with relatives since Zomba is a forest reserve prevailing in natural beauty. The plaintiff conceded that he himself would be paying an annual rent of K4,000.00 to government but expected the defendant to pay USD200 (MK280,000). Having shown the deed plan of Mr. Hadlow the plaintiff stated that it was possible that he was granted a lease of part of the land which was not part of the land owned by Mr. Conybeare. Having been presented with the letter dated 9<sup>th</sup> July 1999 from the District Forestry Officer the plaintiff stated that he disputed the 2<sup>nd</sup> paragraph and that he was not personally there during the visit where they established that the land leased to the plaintiff shares a boundary with the road reserve. He stated the explanation that Celtel never encroached on his land was not correct. The plaintiff admitted that he commenced an action against Celtel in the Zomba Court which failed as his grounds for bringing the action were held not to be valid, that of the health hazard and eyesore as is the case in Europe. The plaintiff stated that he subsequently brought this claim when he obtained the deed plan 52/70 in August 2002.

Before the plaintiff closed his case he confirmed the documents that he had tendered to be as follows:

- The lease dated 7<sup>th</sup> March 2005 marked as exhibit P1
- The licence between Dept of Forestry and Celtel dated 17<sup>th</sup> February 2000 marked as exhibit P2.
- letter from plaintiff to Celtel dated 26<sup>th</sup> August 2002, marked as exhibit P3.
- letter from plaintiff to Celtel dated 9<sup>th</sup> August 2002, marked as exhibit P4.
- an invoice addressed to Celtel dated 9<sup>th</sup> August 2002, marked as exhibit P5.
- an invoice for USD2,000 addressed to Celtel dated 5<sup>th</sup> August 2002, marked as exhibit P6.
- an invoice dated 30<sup>th</sup> August 2002, marked as exhibit P7.
- letter from Celtel to plaintiff dated 18<sup>th</sup> September 2002, marked as exhibit P8
- letter from plaintiff to Celtel dated 4<sup>th</sup> October 2002, marked as exhibit P9.
- statement from plaintiff to Celtel dated 31<sup>st</sup> January 2003, marked as exhibit P10.

In reexamination the plaintiff confirmed that the document marked exhibit P1 was a lease of 99 years of 3.02 hectares of land known as plot no. 12 at Zomba. The plaintiff stated that it would be wrong to state that the lease had expired when the defendant started erecting the structures as it was still in force at the time of erecting the mast. The plaintiff stated that there was a road between the defendant and forestry



on both the sketch plan attached to the lease and the sketch plan attached to the defendant's licence and that on the plaintiff's deed plan the defendant erected the mast on point 87 west. That on the defendant's sketch plan it is on west. On the plaintiff's deed plan the land was owned by AC Dent and the land to the east of the road is pasture land. In closing the plaintiff stated that he had not claimed specific damages and he would accept to be bound by the assessment of the court.

The plaintiff was recalled for the purposes of tendering a document which was inadvertently left out, which happened to be the offer of the lease dated 9<sup>th</sup> March 1994 was tendered and marked as exhibit P11. In cross examination he conceded that an offer means that you do not own it as yet and stated that the offer was made subject to Land Act. In reexamination the plaintiff stated that he was granted the lease and its effective date was 1<sup>st</sup> April 1994.

In defence, the defendant called one witness Mr. Davie Huwa, the defendant's Telecommunications Engineer. He stated that in 1999, Celtel Malawi Limited had identified a piece of land in Zomba for the erection of a base transceiver station where a tower was to be erected. He then proceeded to take further steps for the grant of a licence by the Forestry Department to Celtel Malawi Limited. This licence was subsequently granted to the Company in February 2000. He testified that when the building work was being carried out by Celtel Malawi Ltd, there was no resistance or objection by the plaintiff against the erection of the structures. He alleged that it was probably only after more than a year had expired from the time that the tower was erected that the plaintiff began making attempts to get the defendant out of the site in dispute.

#### *The decision*

The above, in brief, is what was adduced in court. Both parties had submitted their final submissions in this case. This is a claim for trespass and nuisance. This court will first deal with the claim for trespass. Liability for negligence is based on the common law concept of the duty to take care which every person owes to his neighbor to avoid causing injury to the neighbour: *Mwase v Lilongwe City Council* [1991] 14 MLR 327. At common law a person is said to have been negligent when he fails to take reasonable care to avoid acts or omissions which one can reasonably foresee would likely injure persons who are so closely and directly affected by one's act that one ought to reasonably have them in contemplation as having been so affected when doing the act: *Donoghue v Stevenson* [1932] AC 562; *Tembo and others v Shire Buslines Ltd* [2004] MLR 405. The burden of proving these civil claims, which is on a standard of proof on a balance of probabilities, rested on the plaintiff.

The question is whether or not the plaintiff was the owner of the premises at the time the defendant occupied the same and the defendant committed negligence

by trespassing on it. In *Munthali v Mwakasungula* [1991] 14 MLR 298 the court held in approval the definition of trespass in *Clerk & Lindsell on Torts* (14 ed), paragraph 1311, defines trespass as any unjustifiable intrusion by one person upon land in the possession of another. It is not in dispute that the plaintiff has been in lawful occupation of plot No. 12, Zomba Plateau since October 1978. He stated that Mrs. Conybeare assigned her leasehold interest to him by way of sale. The evidence further shows that upon expiry of the said leasehold interest, the plaintiff applied for a lease of the land from the Government, and the application was approved. The lease was to be for 99 years beginning 1<sup>st</sup> April 1994. He was given an offer letter to that effect, and by way of accepting the offer he was paying fees and duties in the sum contained thereon.

The evidence further shows that the defendant came to occupy the land in issue around March 2000. The defendant raises a defence that it had a licence from the Department of Forestry. However the evidence from Davie Huwa reveals that when the site was identified, Celtel Limited realized that the land belonged to somebody else. The witness testified that after consultation, the Forestry Department realized that the property was within their jurisdiction and went ahead to give the land to the defendant. It is this authority which the defendant relies upon in denying the claim of trespass.

On the other hand, the defendant suggests that at the time it took possession of this land, the plaintiff's lease had already expired; hence the land had reverted to the Government. The effect of this argument is that the plaintiff had no legal right of possession of that land. However, this is in contradiction with what the defence witness had stated during cross-examination that the lease which the plaintiff was offered and accepted was for 99 years. According at the time the defendant started its work on it, the lease was still in force. It cannot be said that it had expired and reverted back to the Government.

It was made clear by the defence witness that when the Department of Forestry had initially given the defendant this land, it transpired that the land was already in another person's possession. Later the Department made consultations whose findings were not disclosed in the court. The defence relies on the licence between Department of Forestry and Celtel Malawi Ltd which was issued on 17<sup>th</sup> February, 2000. Meanwhile the plaintiff had already made an application of lease renewal to the Government of Malawi. Evidence will show that the application was made in around April 1994. It was a 99-years lease. He was paying for the fees and duties in respect of the lease applied for. The lease document was then issued on 7<sup>th</sup> March 2005, and it was made effective from 1<sup>st</sup> April 1994. It can be noted here that at the time the defendant entered upon this land for the erection of a tower in 2000, the plaintiff's lease was still in force, as he had already made an application to the Government in 1994, continued paying for the fees and dues as contained thereof.



This alone, *prima facie*, gave the plaintiff authority over this land. He was the rightful possessor of that land.

The defence witness also conceded during cross examination that at the time they started work on this time, a lease for 99 years, which was granted to the plaintiff herein, was in operation. It is also the finding of this court that the licence granted to the Defendant by the Department of Forestry did not specify the exact site and they cannot rely on it to justify their trespassing into the plaintiff's land. It is therefore the finding of this court that the defendant is liable for trespassing into the plaintiff's land without justification.

The next issue is about nuisance. Nuisance is basically concerned with unreasonable interference with a person's use or enjoyment of his land or some right in connection with his land. In respect of nuisance the law demands that every person owes a duty to others not to commit nuisance and if he breaches this duty he does so at the peril of a criminal indictment or of a civil action by the one who has suffered special damage: *Mwase v Lilongwe City Council* [1991]14MLR 327. The general averment of nuisance in the pleadings must have been particularised and evidence should have been led to support it. The plaintiff submitted that the structures and activities of the defendant on his land inflicted material injury to the land and constantly caused substantial discomfort and inconvenience on his part for a substantial length of time. This court is of the view that the claim for nuisance should be dismissed as the plaintiff did not plead the particulars of the alleged nuisance by the defendant and he did not adduce evidence to prove the allegation of the nuisance. I find that on the pleadings and evidence as they stand the claim for nuisance cannot be sustained and is dismissed for the abovementioned reasons.

In summary this court finds that the claim against the defendant for trespass to land is successful while the claim for nuisance is dismissed. The plaintiff is awarded damages for trespass which are to be assessed by the Registrar. The plaintiff is awarded costs of the action for his proved damages which are to be taxed by the Registrar.

Delivered in open court this 26<sup>th</sup> day of September 2018 at Chichiri, Blantyre.

  
Dorothy nyakaunda Kamanga

JUDGE

*Case Information:*

The late Hon Justice Manyungwa  
Mr. Kanyenda/ Mr. Chidothe,  
Mr. Gulumba,  
Mrs. Chiume  
Ms. Nyirenda/ Ms. Million,

Trial Judge.  
Counsel for the Plaintiff.  
Counsel for the Defendant.  
Court Reporter.  
Court Clerks.