

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 737 OF 2016

BETWEEN:

MWAIWAWO MEJA	1st PLAINTIFF
NASIMBENJI KACHIMANGA	2nd PLAINTIFF
FRANK MAIDEN	3rd PLAINTIFF
MARY MAIDEN (suing as administrators of the Estate of Thabu Meja (deceased))	4th PLAINTIFF

AND

MAKANDI COFFEE AND TEA ESTATES LIMITED DEFENDANT

CORAM: JUSTICE M.A. TEMBO

Kazembe, Counsel for the Plaintiffs
Banda, Counsel for the Defendant
Mankhambera, Official Court Interpreter

JUDGMENT

1. This is this Court's judgment following a trial of this matter on the plaintiffs' claim for damages for the loss of dependency on the deceased, Thabu Meja, who died in the custody of the defendant's security agents and for the loss of expectation of life on the part of the

deceased. They indicate that they proceed as administrators of the estate of the deceased.

2. The plaintiffs' claim is that the defendant is owner of Mphezu Estate. And that on 25th September 2016 around 18.00 hours the deceased was passing through Mphezu Estate when he was attacked by the defendant's guards.
3. They claim further that the guards were nine in number and they tied up the deceased and started beating him with hammer and metals on his stomach. And that the guards left the deceased to die. And that thereafter a certain passerby alerted the relations of the deceased about this whereupon they came to pick up the deceased. They assert that their relative later died. And that the defendant later bought a coffin for the deceased after police took his body to Thyolo Hospital.
4. The plaintiffs assert that the death of the deceased was caused by the defendant's guards and some guards have been arrested and charged with murder.
5. They claimed further that the defendant's employees were negligent in the course of their duties therefore making the defendant vicariously liable. They stated the particulars of negligence as follows:
 - a. Failure to follow proper procedure when reprimanding a suspect.
 - b. Taking the law into their own hands and administering mob justice instead of just arresting the suspect if they suspected him of any wrong doing.
 - c. Attacking the deceased without verifying what he was doing on the premises.
6. The list of plaintiffs and their relationship to the deceased was indicated as follows: 1st plaintiff is son; 2nd plaintiff is the widow; 3rd plaintiff is the uncle and 4th plaintiff is the mother. There also two other widows, three daughters and a son.
7. The plaintiffs claim that they have suffered loss as a result of the incident since the deceased was 38 years old at the time of his death and they depended on him as bread winner. Further that his life was shortened.

8. In its defence, the defendant admitted owning Mphezu Estate but denies that the plaintiffs have the requisite *locus standi* to bring this action.
9. It admitted that the death of the deceased; that his body was taken to Thyolo hospital and that it purchased a coffin on the request of his relatives. It however denies that the deceased was passing through Mphezu estate as alleged; that the deceased was attacked by nine guards and that the deceased was left to die and was picked up by his relatives.
10. The defendant asserted that the deceased trespassed into its estate with an intention to unlawfully cut down the defendant's trees on the material day between 12.00 and 13.00 hours. That the deceased actually cut down four trees belonging to the defendant without authority or permission. Further, that on being confronted by the defendant's two guards who were on duty as to why he was cutting down the defendant's trees, the deceased charged at and attacked the guards with a panga knife and a short spear. And that, in self-defence, the guards beat the deceased with button sticks, arrested and took him to the defendant's estate offices.
11. The defendant denies that it negligently caused the deceased's death. It asserts that the two guards' defence against the deceased's lethal attack led to his death. The defendant denied the plaintiffs' claims.
12. The issue for determination is whether the defendant's guards negligently caused the death of the deceased herein.
13. As correctly submitted by both parties, the plaintiffs have the duty to prove their case on a balance of probabilities. See *Nkuluzado v Malawi Housing Corporation* [1999] MLR 302 and *Miller v Minister of Pensions* [1947] All ER 372.
14. The 3rd plaintiff was the sole witness on behalf of the plaintiffs. He testified that on 25th September 2016 the deceased, Thubu Meja, was passing through Mphenzu Estate which belongs to the defendant when he was stopped by the defendant's guards who accused him of stealing unidentified items and that the defendants' guards beat the deceased.
15. He stated that the guards then dragged the deceased to their office where the deceased was beaten. Further, that the guards then took the deceased to the Police station and hospital where the deceased received no help due to the severity of the injuries he had sustained.
16. He asserted that the defendant then sent word to the deceased's home for relatives to come pick him up from their offices. And that the

deceased died as a result of the injuries. Further, that an angry mob of villagers then came to the defendant's offices as a result of the deceased passing away and the villagers were eventually calmed down by the Police and Chiefs.

17. He then stated that that upon entering the Guard Room he found that there was a lot of blood in the guard room, being the deceased's blood as a result of being beaten by the defendant's guards.
18. During cross examination, he stated that the deceased was his nephew and that he had been acting as his guardian. He further stated that he was not there when the deceased was being beaten but pieced the story together from other accounts.
19. He stated that the deceased did not have a bad reputation as an aggressive person. He also stated that the deceased was not cutting down trees. And that the Deceased was not killed through mob justice.
20. During re-examination, he stated that there was only commotion at the defendant's premises after the deceased had already passed away thus making it was impossible that the deceased was killed by the mob of villagers. He reiterated that guards employed by the defendant killed the deceased.
21. He then stated that all the beneficiaries of the deceased's estate were Mwayiwawo Meja, Emily Meja, Margaret Meja, Eliza Meja and Violet Meja who are all being looked after by him.
22. He asserted that the deceased was a Christian, unmarried and generally had a good standing in his community.
23. He stated that he entered the defendant's premises at 16.00 hours and he found eight guards. He said that he carried the deceased in a wheelbarrow as the deceased was on the verge of death following the beating by the defendant's guards. That marked the end of his testimony.
24. There was one defence witness, Mr Issa Kayisi. He testified that he works for the defendant as a security guard and was doing so on the material day herein. He stated that his duties are among others, to guard the defendant's premises and protect the defendant's employees or its property.
25. He then stated that on the material day, on 25th September 2016, he received a call from his colleague, Foster Manuel, who was at the material time employed by the defendant as a guard and was guarding

Field No. 5 at Mphenzu Estate, where he saw the deceased, who was equipped with a saw, short spear and panga knife. Besides the deceased were 4 cut poles (trees). When they approached and asked him as to who had authorised him to cut down the trees, the deceased drew his short spear and charged at the 2 guards; intending to stab him, saying they were nothing to him.

26. As he realised that the deceased was intending to attack them with his spear, they defended themselves by hitting him with their sticks thereby disempowering him. They consequently arrested and brought him to the Mphenzu Estates' offices.
27. He asserted that when news spread that the deceased had been arrested, many people from the surrounding areas came to witness the arrest. Some of the villagers started beating the deceased. Despite their protests not to beat him, the people refused, saying that the deceased had terrorised people in general for too long a time. Furthermore, that he was a man who boasted that no one could touch him and so he could beat and steal from people as and when it pleased him.
28. He then stated that he then left the deceased at the office and went back to Field No. 5 to collect the poles that the deceased had cut. After leaving the poles at the office, he went home. The following day, 26th September 2016, he heard that the deceased had passed away. Thereafter, people from the deceased's village came to defendant's offices at Mphenzu Estate where they dropped him at the offices and started demolishing, burning down and vandalising the defendant's property. And that the situation was controlled by the police from Bvumbwe, who were backed by their colleagues from Blantyre.
29. During cross-examination, he said that he was called from the office by a whistle from his colleague, Foster Manuel, to come to Field 5 of Mphenzu Estate, where he found the deceased with Foster. The deceased was in the field, where he had cut down the defendant's trees. He and Foster beat the deceased with sticks. They then arrested and took the deceased to offices of Mphenzu Estate.
30. He said he was not around when people of surrounding area came and beat the deceased. He said that he saw the trees which the deceased had cut down, which he later collected and brought them to the office, thereafter he went to his house. He admitted that he knew that mob

justice was a crime and that it was not good to hit a person save to take him to police.

31. During re-examination, he said that he and Foster beat the deceased with sticks in order to defend themselves and arrest him because he intended to attack them with a panga knife, saw and short spear. He stated that the deceased had cut down 4 trees belonging to the defendant without authority. He added that at the time of arresting and bringing the deceased to the office, the deceased was in good shape.
32. As aptly put by the defendant, this Court has to determine whether the defendant is liable for negligently causing the deceased's death. In doing so, this Court has to address a number of issues, namely, whether or not the plaintiffs had the requisite *locus standi* to institute these proceedings; If so, in light of the evidence as adduced by the 4th plaintiff, whether a case against the defendant had been made out; If so, whether or not the defendant's guard were entitled to self-defence; and lastly, if so, whether or not the defendant's guard had negligently caused the death of the deceased.
33. The plaintiffs then made submissions on their case. They asserted that according to their amended statement of claim the 1st plaintiff is the son of the deceased, the 2nd plaintiff is the widow of the deceased and the 4th plaintiff is the mother of the deceased. They then observed that according to section 4 of the Statute Law (Miscellaneous Provisions) Act all those three claimants are entitled to bring this action as beneficiaries of the deceased's estate. They therefore asserted that they have standing to sue the defendant in this matter. The issue of standing is fundamental and ought to be resolved before the claim itself is looked into.
34. On its part, the defendant submitted on the issue *locus standi*. It observed that under Chapter IV of the Constitution, every person has a right to bring action against another in a court of law and obtain effective remedy.
35. It observed further, that section 41 of the Constitution provides that:

- (1) Every person shall have a right to recognition as a person before the law.

(2) Every person shall have the right of access to any court of law or any other tribunal with jurisdiction for final settlement of legal issues.

(3) Every person shall have the right to an effective remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him or her by this Constitution or any other law.

36. It submitted that on the other hand, in a proper case, the constitutional rights of access to justice and have effective remedy in a court of law may be restricted or limited by operation of the law.

37. It then observed that section 44 (1) of the Constitution reads:

No restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society.

38. It submitted that it is the requirement of the prescribed law that, in an action for damages for the death of a person caused by a wrongful act, neglect or default, the right to bring the action for such damages is restricted to executor or administrator.

39. It observed that section 4 (1) of the Statute Law (Miscellaneous Provisions) Act provides that:

Every action brought by virtue of this Part shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, and shall, subject to section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action, the court may award such damages as it may think proportioned to the injury resulting from such death to the persons respectively for whom and for whose benefit such action is brought; and the amount so recovered after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned persons in such shares as the court, by its judgment, shall find and direct:

Provided that not more than one action shall lie for and in respect of the same subject-matter of complaint, and that every such action shall be commenced within three years after the death of such deceased person.

40. It then observed that in the case of *Ingolosi v Mahomed and Nyaude*, 1971-72 ALR Mal. 335 (HC), the plaintiff, who was an uncle of the deceased, brought an action in negligence claiming damages for death

of the deceased. When he realized that he had no *locus standi* in court, he applied for amendment of the writ of summons to add the parents of the deceased as the plaintiffs. It noted that Skinner, C.J. at page 337 line 40, observed that:

The word "parent" is defined by s.2 of the Act to mean "a father, a mother, a grandfather, a grandmother, a stepfather and a stepmother". I am satisfied that an action cannot be maintained by an uncle and that an action could not be brought by the plaintiff.

41. It then observed that on the other hand, apart from the executor or administrator, the requirement of the prescribed law is that only the wife, husband, parent and child of the deceased person can bring an action on their own behalf and not on behalf of the deceased's estate, where there is no executor or administrator, or if no action is brought by the personal representatives within six months of the death.

42. It then observed that section 7 of the Statute Law (Miscellaneous Provisions) Act provides that:

Where, in any case intended and provided for by this Part, there shall be no executor or administrator of the person deceased, or if no action is brought by such executor or administrator within six months after the death of such deceased person, an action may be brought by and in the name or names of all or any of the persons for whose benefit such action would have been brought, if it had been brought by and in the name of such executor or administrator, and every action so brought shall be for the benefit of the same person or persons as if it were brought by and in the name of such executor or administrator.

43. The defendant then noted that in the case of *Mbaisa v Ibrahim Ismail Brothers* (1971 – 72) ALR Mal. 321, the plaintiff, who was the brother of the deceased, sought damages for loss of expectation of life and future earnings on behalf of the estate of the deceased. The plaintiff was not the personal representative of the deceased. He then applied to amend the title of the action by adding the deceased's widow as a plaintiff, and amending his own status to sue as next friend of the infant children of the deceased. The defendant resisted the application. Skinner, C.J., at page 322 lines 35 - 40 and page 323 lines 5, said:

It appears clear to me from a perusal of the statement of claim in the instant case that the action is one brought for the benefit of the deceased person's estate under Part II (now reads Part I) of the Act, and reference to s. 7 is misconceived. An action for the benefit of the estate can be brought by the personal representatives only.

44. It then submitted that it is a well settled principle of common law that a party must have requisite *locus standi* to bring an action in a court of law. And that this requirement is not only procedural but also substantive.

45. It observed that in the Malawi Supreme Court of Appeal case of *Civil Liberties Committee v Ministry of Justice and Registrar General*, Civil Appeal No. 12 of 1999 Tambala JA, delivering the Judgment of the court said:

As a general rule, a person who commences an action in a court of law is required to have *locus standi* in the subject matter of the action. The requirement is so basic that we sometimes take it for granted that a person who has no legal right or interest to protect would commence an action in a court of law.

46. It noted that in another Supreme Court of Appeal case of *Chitakale Plantations Ltd v. Mary Woodworth and another (2)* [2010] MLR 62 (SCA), Mtambo JA, in a unanimous decision of the Court, agreeing with what the Judge *a quo* had said on *locus standi*, at page 66 g-h, remarked:

..... the truth of the matter in this case is that the plaintiff has failed to establish that it has any right to bring this Action. In other words, it has failed to show that it has any *locus standi* in this matter. On this technical score, therefore, I am quite entitled to dismiss the plaintiff's matter herein purely as one lodged in Court by a total stranger".

We are unable to find fault with this analysis of the law and the conclusion the Court came to. Both the analysis of the law and conclusions are correct.

47. It then observed that Chipeta J., (as he then was) in the case of *The Registered Trustees of the Public Affairs Committee v Attorney-General and The Speaker of the National Assembly* [2002-2003] MLR 333 (HC) at page 339 a-c, said:

It will be prudent in this matter, I think, to first attend to the question of the plaintiff's standing, alias *locus standi*, in it. This is so because the presence of standing means that I can proceed to examine the merits and demerits of the originating summons taken out by the plaintiff, while absence of standing means the automatic end of this case upon my so holding. It would thus be futile to go into a debate of all the merits and demerits of the action herein when it may well be that the case does not even pass the first hurdle of standing. I will, therefore, proceed to examine the parties' arguments on this basic question and either terminate the case at this point or proceed to determine it on the merits depending on what I find to be the plaintiff's position vis-à-vis *locus standi*.

48. The defendant then submitted that the four plaintiffs are a son, widow, uncle and mother of the deceased respectively. And that by their amended statement of claim they have been very explicit and candid that they are "the administratrixes of the estate of Thubu Meja (deceased) and bring this action on behalf of the estate of the said Thubu Meja (deceased)".
49. It observed that during the trial of this matter on 9th November 2018, the 3rd plaintiff gave a written witness statement on behalf of "*Mwaiwawo Meja and 3 others*", which he adopted and tendered together with the deceased's death report. It noted that the 1st, 2nd and 4th plaintiffs did not adopt the 3rd plaintiff's witness statement as their own statement in so far as it related to them. With the end result therefore is that the Court had received the plaintiffs' evidence only from the 3rd plaintiff.
50. The defendant noted that during cross examination, the plaintiffs' witness confirmed that he and the rest of the plaintiffs were bringing this action for the deceased's estate. And that he further admitted that he and the other plaintiffs had not been granted letters of administration as personal representatives of the deceased's estate.
51. The defendant contended that in view of the above admission, the plaintiffs have dismally failed to prove that they had the requisite *locus standi* to institute these proceedings as personal representative of the estate of Thubu Meja. And that, on the other hand, the 3rd plaintiff, being an uncle of the deceased, had no such *locus standi in judicio* by himself. Consequently, that, by virtue of the above authorities, this action should be dismissed with costs.

52. It contended further that, in case this Court may be inclined to hold the view that the 1st, 2nd and 4th plaintiffs have a legal standing in this matter in pursuance of section 7 of the Statute Law (Miscellaneous Provisions) Act, it emphatically contends that they do not have it in the circumstances of this case. It pointed out that the plaintiffs' amended statement of claim is very clear on how they have pleaded, that is, that they are bringing this action on behalf of the deceased estate and not on their own behalf as beneficiaries. In view of this contention, the defendant asserted that this Court is bound by the plaintiffs' pleading, as per the authority of the Malawi Supreme Court of Appeal case of *Nseula v Attorney General and another* [1999] MLR 313 (SCA), where Banda CJ, delivering the Judgment of the Court, said at page 321 f-h:

The court itself is much bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon an inquiry into a case before it other than to adjudicate upon the specific matter in dispute which the parties themselves have raised by their pleadings.

53. This Court agrees with the plaintiffs that some of them are indeed entitled to sue the defendant in their capacity as beneficiaries of the deceased herein. See section 7 of the Statute Law (Miscellaneous Provisions) Act.

54. However, the defendant correctly submitted that the plaintiffs have in fact, according to their statement of claim, sued the defendant in their capacity as administrators of the estate of the deceased. This is pursuant to section 4 (1) of the Statute Law (Miscellaneous Provisions) Act.

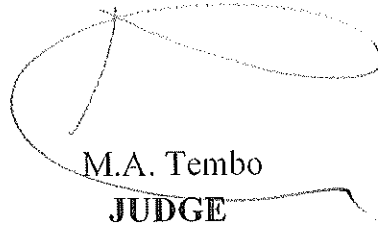
55. However, it is clear on the evidence that none of the plaintiffs has been granted authority to act as an administrator of the estate of the deceased to warrant any of them to sue in that capacity. Therefore, as correctly submitted by the defendant, plaintiffs do not have the capacity to sue as administrators of the estate of the deceased.

56. Lack of standing to sue is fatal to a claim. See *Chitakale Plantations Ltd v. Mary Woodworth and another* (2) [2010] MLR 62 (SCA).

57. The plaintiffs do not have the requisite standing to sue in the capacity they sued in this matter. And this matter is dismissed on account of that considering that this Court is bound by the pleadings filed in 2017. This Court will in that case not examine the merits of this case on the evidence adduced by both parties.

58. The plaintiffs claim is accordingly dismissed with costs to the defendant.

Made at Blantyre this 1st October 2020.



M.A. Tembo
JUDGE