

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 1058 OF 1997**

BETWEEN:

RAPHAEL KALOMBE.....PLAINTIFF

-and-

PACKAGING INDUSTRIES (MW) LTD.....DEFENDANT

CORAM: THE HON. MR JUSTICE F.E. KAPANDA

Mr Mpando, of Counsel for the Plaintiff

Counsel for the Defendant, Absent

Mr A.W. Nguluwe Official Interpreter/Recording Officer

Date of hearing : 16th February 1999

Date of judgment : 10th December 2001

Kapanda, J

JUDGMENT

Introduction

This matter was heard by late Justice Kunitsonyo (may his soul rest in peace) but he never had the opportunity to pronounce his judgment. I will therefore proceed to deliver the judgment which the court ought to have made. In doing this I will be guided by the evidence that was recorded by the late judge. I wish to further observe that the record shows that the Defendant, and Counsel, did not make any appearance at the trial of this action.

In an action commenced on 29th May 1997 the Plaintiff is claiming damages, from the Defendant, Company for conversion of his goods.

On the 25th day of June 1997 the Defendant, through Counsel, filed a notice of intention to defend the action that was commenced by the Plaintiff. As a manifestation of this intention the Defendant's legal practitioners, on the 8th of July 1997, served on the Plaintiff its statement of defence. In this regard it is essential that the relevant parts of the pleadings that were exchanged between the parties should be laid out in this judgment.

Pleadings

In respect of the Plaintiff the following were the allegations of fact made in his statement of claim attached to the writ of summons:-

- “1. The Plaintiff was at all material times, the Defendant’s employee.
2. At all times, the Plaintiff is and was the owner and entitled to possession of the goods particularised in paragraph 2 hereof.
3. At a date which the Plaintiff cannot specify, save that it was in or around the month of September 1994, the Defendant, its agents or servants acting on its behalf wrongfully took possession of the said goods and has failed or refused to deliver them up to the Plaintiff thereby converting the same to the defendant’s own use and wrongfully depriving the Plaintiff thereof.

Particular of Goods

1 Big display cabinet, 1 hot plate (2 coiled), 10 pieces 2 meter curtains, 1 stove paraffin, 1 mbaula, 2 sofa sets (Colorado) 4 piece and 3 piece, 2 dining sets (8 chairs and 6 chairs) 2 wooden double beds (with head boards and drawers), 1 wooden dressing table, 1 single door fridge, 1 bookshelf (wooden), 1 wardrobe (big), 2 sofa set wrappers, 2 table covers (dining), 1 big 4 plate cooker, 2 videos, 1 double door fridge, 1 big deep freezer, 1 typewriter (Facit), 3 new tyres for Peugeot 504, 1 desk calculator, 1 windscreen for Peugeot 504.

4. By reason of the matters aforesaid, the Plaintiff suffered loss and damage.”

As regards the Defendant, the following relevant averments were made in the statement of defence that was served on the Plaintiff:-

- “1. The Defendant refers to paragraph 1 of the Statement of Claim and states that the Plaintiff was its employees from the 23rd of July 1990 to the 8th of August 1994.
2. The Defendant refers to paragraph 2 of the Statement of Claim and denies the contents thereof.
3. The Defendant denies having wrongfully taken possession of the goods particularised in paragraph 3 of the Statement of Claim or at all. In the premises paragraph 3 is denied and the Plaintiff is put to strict proof thereof.
4. The loss and damage referred to in paragraph 4 of the Statement of Claim is denied.
5. The Plaintiff further denies each and every allegation contained in the Statement of Claim as if the same were herein set forth and traversed seriatim and puts the Plaintiff to strict proof thereof.”

It is observed, from the Defendant’s statement of defence, that the parties herein joined issues on the Plaintiff’s lawsuit. In view of this there was need for the matter to be set down for hearing so that evidence could be adduced to prove the facts in issue. The matter was first set down for hearing on the 12th-13th of November 1998 but on the appointed day the matter was neither heard nor is there

any indication that it was actually called. The action was set down again for hearing on

the 15th-16th of February 1999 and to this end

a formal notice of hearing was served on the legal practitioners of the parties herein.

On the 16th day of February 1999, when this action was called for hearing the Defendant, and its legal representative, were absent. The court invoked the provisions of Order 35 Rule 1 Subrule 2 of the Rules of the Supreme Court and proceeded with the trial of the action. The Plaintiff was then allowed to testify and prove his claim. It is on record that Plaintiff, together with his two witnesses, are the persons who testified before the court. I will now move on to consider the evidence that was offered by the Plaintiff to prove his claim against the Defendant.

Evidence

Of the three witnesses who testified the first to be called was the Plaintiff who told the court that he was in the employ of the Defendant until sometime in September 1994 when his services, with the Defendant Company, were terminated. He further testified that as part of his fringe benefits his employers had leased a house for him at Bangwe. It was his further testimony that his services had been terminated whilst he was away to his home village.

The Plaintiff further told the court that his employers, upon terminating his employment, proceeded to the said house in Bangwe and broke the door of the house and entered to the house and took away his personal items, particularised in paragraph 3 of statement of claim, purportedly as security for a debt, in the sum of K2,000.00, owed to the Defendant. It was further given in evidence, by the Plaintiff, that his employers told him that they were going to release his goods upon settlement of the said debt through

a remittance of the Plaintiff's pension, which was due from the National Insurance Company (Nico) but notwithstanding receiving the sum of K1,224.49, being the said pension remittance, the Defendant did not, and has not returned his goods to him. I wish to observe, and this was admitted by the Plaintiff, that he still owes the Defendant the sum of K759.25 being the outstanding balance of the debt owed to the Defendant.

The second witness to testify was the Plaintiff's wife, PW2, a Mrs Mevis Kalombe (nee Kabambe). She basically repeated what the Plaintiff told the court to the effect that the Defendant took away the Plaintiff's goods.

The last witness, to be called by the Plaintiff was Mrs Catherine Beula a neighbour of the Plaintiff. Her testimony was very short and it was essentially that the Defendant's vehicle came to collect from the Plaintiff's house at Blantyre. It was her further sworn evidence that at the time the Defendant's motor vehicle came to collect the said goods the Plaintiff and his wife were not there.

The above is, in a nutshell, the evidence that the Plaintiff offered to prove the allegations of fact made in his statement of claim. I now proceed to isolate the issues for determination in this matter. In doing this I will be mindful of the fact that the Plaintiff is required to prove, in view of the non appearance of the Defendant, the allegations of fact made in the statement of claim.

Issues for Determination

As stated earlier, in isolating the issues for determination, considering that there was non appearance by the Defendant this court must concern itself with whether the Plaintiff has proved his

claim - Barker -vs- Furlong [1891]2 Ch. 172. In this regard the court will have no regard to the matters pleaded in the Defendant's statement of defence but rather this court must enquire as to whether or not the allegations of fact in the statement of claim are borne out by the evidence offered.

In my judgment, and in view of the observation that I have just made above, the issues that must be determined by this court are as follows:-

- (a) whether the Plaintiff was the owner of the goods particularised in paragraph 2 of the statement of claim.
- (b) whether the Defendant, its servants or agents, wrongfully took possession of the Plaintiff's goods.
- (c) whether the Defendant, its servant or agents, failed and refused to deliver the goods to the Plaintiff and thereby converted the goods to the Defendant's use.
- (d) whether the Defendant, its servants or agents, wrongfully deprived the Plaintiff of his goods.
- (e) whether, as a result of the Defendant's conduct, the Plaintiff has suffered any loss or damage.

It must be observed that, inspite of my singling out the questions that arise and fall to be decided in this matter, I shall not make mention of each one of them when I am making my findings of fact. But it is trusted that at the end of this judgment I will have decided on all the issues that require determination. I will now move on to make my findings of fact based on the uncontradicted evidence that was received by the court.

Law and Findings

burden and standard of proof

Despite the fact that the Defendant did not attend court, on the appointed day for the trial of this action, the position at law remains the same regarding the burden and standard of proof. In this regard I have reminded myself of the settled principle of law that the burden of proving the facts in issue lies upon the party who has, in his pleadings, maintained the affirmative of the issues in dispute. Moreover, I am mindful of the well known principle of law that in civil actions the standard of proof is on a prevalence of probabilities. In course of making my findings of fact on the matters in issue I will bear in mind these two settled principles of law as regards the burden and standard of proof.

Without much ado let me proceed to make my determination on the pertinent issues on this matter. But before that let me point out that it is common ground that the Plaintiff was an employee of the Defendant until his services were terminated, or until he was

dismissed from employment, sometime in August or September 1994. The exact dates when the Plaintiff was employed and dismissed, or his services were terminated, is of little significance.

Was the Plaintiff the owner and entitled to possession of the goods the subject matter of this action?

As I understand it, the position at law is that for a party to succeed in an action for conversion he must prove, inter alia, that he is the owner and entitled to possession of the chattel subject matter of the action. I am of this view because of the definition of conversion as given in the cases of BNN Nyirongo -vs- Attorney General Civil Cause No. 51 of 1994 High Court (unreported) and

Chitungu and Chiutsi -vs- Napolo Ukana Breweries Limited Civil Cause No. 601 of 1992 High Court (unreported).

In the instant case, I find and conclude that the Plaintiff was the owner and entitled to possession of the goods that are particularised in paragraph 3 of the Plaintiff's statement of claim. There is the uncontroverted evidence of the Plaintiff to prove that the said goods are his and that he is entitled to possession of same.

Did the Defendant, its servants or agents, commit the tort of conversion in respect of the Plaintiff's goods?

It is trite law, which requires no citation of a case authority, that conversion the wilful interference with any chattel, by the Defendant, in a manner inconsistent with the right of the Plaintiff without lawful justification whereof the Plaintiff is deprived of the use and possession of the chattel.

Turning to the present case, it is the finding and conclusion of this court that, on the undisputed evidence on record, the Defendant committed the tort of conversion. The Defendant's taking of the Plaintiff's goods amounted to an interference with the goods in a manner inconsistent with the rights of the Plaintiffs. It matters not that the Plaintiff had an unsettled debt with the Defendant. Indeed, it is in evidence that the Defendant had told the Plaintiff that it was going to recover the debt from the Plaintiff's terminal benefits. Thus there was no need to take the Plaintiff's goods as a lien. As a matter of fact the Defendant had another lien over the said terminal benefits. Further, it was wrong for the Defendant to have two liens in connection with a single debt that it was owed by the Defendant.

Moreover, it is in evidence that a good part of the debt was settled through the pension money the Defendant got from Nico. In point of fact the amount that remained unsettled is only the sum of K759.25. It was unconscionable for the Defendant to refuse to return the goods or part of the goods for a debt of only this meagre sum of K759.25. If the list of the goods converted is anything to go by it would appear that, despite the fact the value of same has not been ascertained, the value of the goods is more than the said sum of K759.25 the Defendant is owed.

Furthermore, I wish to note that the fact that the Defendant did not return, on demand, the

Plaintiff's goods is proof of conversion since same is indicative of an intention on the part of the Defendant to permanently deprive the claimant of his property. The Defendant's refusal, in this regard, has naturally resulted in the Plaintiff suffering loss and damage.

The long and short of it is that the Plaintiff has proved his case against the Defendant. In the premises the Plaintiff would be entitled to damages for the said loss and damage.

Damages and costs

I have noted that the Plaintiff did not give evidence of the value of the goods the subject matter of this action. It is therefore difficult to assess the damages. In the light of this I order that the damages shall be assessed by the Registrar on a date to be appointed. Further, I award the costs of, and occasioned herein, to the Plaintiff. The said costs are to be taxed if not agreed upon by the parties.

Pronounced in open court this 10th day of December, 2001 at Principal Registry, Blantyre.

F.E. Kapanda

JUDGE