IN THE MALAWI SUPREME COURT OF APPEAL
AT BLANTYRE

MSCA CIVIL APPEAL NO. 65 OF 2009
(Being High Court Civil Cause No. 38 of 2009)

BETWEEN:

NKHUKUTI BEACH RESORT LIMITED.....1ST APPELLANT

MARK MWASE ..... 2ND APPELLANT

ROBERT KAMANGA ..... 3RD APPELLANT

JONI ..... 4TH APPELLANT

- AND -

PATRICK THOMAS MWAFULIRWA ..... 1ST RESPONDENT

THE NEW CHIKALE BEACH
RESORT LIMITED ..... 2ND RESPONDENT

BEFORE: HON. JUSTICE MTAMBO, SC, JA
HON. JUSTICE SINGINI, SC, JA
HON. JUSTICE TWEA, JA

Kaphale, of Counsel, for the Appellants
Gondwe, of Counsel, for the Respondents
Mwale/Balakasi, Court Officials
Ethel Matunga Chisale (Ndunya) Senior Personal Secretary

JUDGMENT

MTAMBO, SC, JA

The genesis of this case was the formation of a limited liability company called Chikale Beach Resort Limited (the company). The first respondent and one Ralph Mhone were, and perhaps still are, directors and shareholders of the company. The Company owned a piece of land described as Plot Number 79 on which it operated the business called Chikale Beach Resort. Disagreements later arose between the two directors/shareholders resulting in the division of the land between them. The first respondent now operates a business styled New Chikale Beach Resort (the second respondent) while Mr. Mhone operates the business called Nkhukuti Beach Resort (the first appellant), on their respective pieces of land. Both New Chikale Beach Resort and Nkhukuti Beach Resort have been incorporated. The Second, third and fourth appellants are agents of the first appellant through whom it has embarked on the development of yet another piece of land within the neighbourshood.

The allegation is that in the course of the developments on this other piece of land, the appellants have trespassed on the respondents' land and that the second, third and fourth appellants, acting in the course of their employment/agency, assaulted the first respondent when he tried to stop the trespass. The respondents therefore commenced the action in the High Court at Mzuzu for an injunction to restrain the appellants from trespassing on their land and, in respect of the first respondent, damages for assault. The action was successful. The injunction was granted restraining the appellants from entering the respondents' piece of land. An amount of K3,500,000.00 was awarded as damages for trespass and K450,000.00 for assault. The appellant now appeals to this Court against these findings and awards.

There are eight grounds of appeal as follows:

(a) that the learned Judge erred in law and in fact in finding that the Respondents could bring the present action despite a finding that they had no *locus standi;*

(b) that the learned Judge erred in law and in fact in finding that the appellants were trespassing onto the 1st Respondents' land comprised in Plot No. 79 which is the property of Chikale Beach Resort Limited and not the property of the Respondents;

(c) that the learned Judge erred in law and in fact in granting an order of permanent injunction against the Appellants restraining them from passing through part of the land comprised in Plot No. 79 despite the finding that the same is the property of Chikale Beach Resort Limited and evidence to the effect that the path used has been in use by members of the general public from time immemorial;

(d) that the learned Judge erred in law and fact by coming to conclusions on the locality of the places in dispute when he never visited the *locus in quo;*

(e) that the learned Judge erred in law and in fact in refusing to grant an order of injunction restraining the Respondents from interfering with the Appellants' construction works;

(f) that the learned Judge erred in law in finding that Mr Mhone is the first appellant in this matter;

(g) that the learned Judge erred in law and in fact in finding that the first Respondent was assaulted by the Appellants and their employees and agents, and

(h) that the learned Judge erred in law and in fact in awarding damages for trespass and assault which were manifestly excessive and without a proper basis for the same.

The grounds of appeal marked (a) to (f), are in respect of the finding of trespass, while those marked (g) and (h) are concerned with the finding of assault and damages, respectively; they were argued together with regard to each subject matter.

The appeal raises three issues: firstly, whether the respondents had *locus standi* to bring and maintain the action, especially, in trespass; secondly, whether the torts of trespass and assault were proved, and thirdly, whether the damages awarded are appropriate.

It was submitted both in the High Court and before us that the Company is not dissolved; that the property in issue (i.e. Plot Number 79) belongs to the Company; that the Company is a distinct person from the directors/shareholders; that the company is capable of suing and of being sued, and, therefore, that if there was any threat to its interests in the property, it would have been the one to take appropriate measures and nobody else, including the respondents. The respondents do not dispute any of these contentions. However, they submit that the reality of the matter is that the Company has ceased trading and that there is now, carrying on business in its place, the second respondent, (New Chikale Beach Resort Limited) and the first appellant (Nkhukuti Beach Resort Limited).

It is commonplace that a limited company incorporated under the Companies Act (Cap. 46:03) of the Laws of Malawi can only be dissolved either by: (a) an order of the Court under s.212; or (b) voluntary winding up by members under s. 245, or (c) members' voluntary winding-up or creditor's voluntary winding –up under s. 248, of the Act. The Registrar of Companies too has the power to dissolve a company by striking it off the register if he has reasonable cause to believe that it is not in operation, among other reasons – see s. 303 of the Act.

At common law, the directors of a company owe the company fiduciary duties which require that they display utmost good faith towards the company in their dealings. It is, therefore, for good reasons that a company is not supposed to be liquidated or

dissolved outside the statutory framework provided in the Act. This is to ensure that the interests of the creditors or those of third parties are taken care of first before the shareholders divide the spoils, so to speak. The long and the short of all this is that the company in the instant case still exists, there being no evidence of its dissolution under the Act, and therefore that it still owns the land in issue.

It is clear to us that the trial Court was aware of this position when it said:

> *"We will not belabour the issue. As a matter of legal fact the company is indeed a separate entity capable of owning property, in this case Plot 79, in its own name. See* ***Salomon v Salomon & Co. Ltd.*** *[1897] AC 22. If we pursued that fact to its logical conclusion there is clearly a lot of merit in the defendants' contention that if the company's property or interests are threatened it is for the company itself to protect them. To that extent the plaintiffs may indeed be no more than busybodies suing as they are not at law owners of Plot 79. But we think with respect that the defendants have misapprehended the law. They in our opinion think that one must have legal title to the land before they can take out and maintain an action in trespass in respect thereof. That is however not the case. The plaintiffs need not have legal title to Plot 79 in order to have locus standi in this matter. Possession is enough. And we have no doubt that in the instant case both plaintiffs have possession of the land in issue. Their business venture New Chikale Beach Resort is operated from the land in question. Clearly they have locus standi."*

Trespass to land has been defined as an unauthorized interference with a person's possession of land. It is, therefore, a wrong against the possession of land and not the ownership of it. It follows that only the person who has possession of the land in question can sue. And whether a person has possession or not is a matter of fact or evidence signifying "an appropriate degree of physical control" – **Powell v. McFarlane** (1977) 38 P & CR 452 at

470. It is not necessary, therefore, that the claimant should have some lawful estate or interest in the land for him to bring a suit in trespass to land. A person who enters the land cannot, therefore rely, in his defence, upon another person's superior right – see **Cahmbers Vs Donaldson**, (1849) 11 East 65; **Nicholls Vs Ely Beet Sugar Factory** (1931) 2 Ch. 84.

It is not in dispute that the respondents are in factual possession of the land in question to the exclusion of the appellants and everybody else. We, therefore, find it irresistible to conclude, as did the learned judge in the court below, that the respondents have *locus standi* in this matter.

We now turn to the question whether the appellants are guilty of trespass. There can be no denying that the appellants used the respondents' land without the respondents' consent to access the other piece of land where they were carrying out some development works. The appellants argued however that they entered the land using a public path. They contended on that basis that they cannot be liable in trespass because they, like other members of the public, were entitled to use the path and that they had been so entitled for many years. This is what the Court said about that contention, and we quote:

> *"We have above quoted in full the amended defence. Nowhere have the defendants pleaded that they were entitled to enter the land in dispute via a public path. They cannot be allowed in our view to raise such defence now. It would not only ambush the plaintiffs it would give the impression that submissions or witness statements can be used as a substitute for pleadings which is not the case at law. We would for that reason alone be entitled to throw out the defendants' defence. But let us assume for argument's sake that the matter of the public path was raised in pleadings, is the defendants' defence made out? The defendants' only witness was Hassan Banda."*

The Court reviewed the evidence of the witness in some detail and came to the conclusion that he (the witness) *"was to a large extent being economical with the truth,"* and therefore disregarded his evidence. The argument that the path which they used was a public one was accordingly rejected. We too would reject that contention for those reasons, and we hereby do so.

Regarding assault, the appellants submit that the High Court erred both in law and fact in finding that the first respondent was assaulted by the first appellant's employees or agents. We have ourselves carefully reviewed the evidence, just as the trial Court appears to have done. The allegation was that the first respondent was pushed to the ground, kicked and run over by wheelbarrows and that as a result he suffered a fracture of the right leg, humiliation and injury to dignity and feelings. The appellants denied the allegation and submitted that if the first respondent was assaulted at all it must have been in the course of preventing him from trespassing in the land of the company (Chikale Beach Resort Limited) and stopping him from denying them entry in the land. The High Court came to this conclusion, and we quote:

> *That the first plaintiff was assaulted can not be disputed. The only question is whether there was a justifiable reason for the same. The defendants claim they did so in the course of stopping the first plaintiff from trespassing into the company's land or stopping him from unlawfully denying them access to such land as they went to the construction site. Either way the defendants' claim has no merit. The land where the assault took place was in his possession as we have already found above. He had the right to stop the first defendant and its agents/employees from trespassing into it. On the other hand the defendants had no business being on the land. They equally had no business stopping the first plaintiff preventing them getting, i.e. trespassing, on to*

the land. Much the same will be said about their claim that they were preventing the first plaintiff from unlawfully stopping them getting access to the land in issue. The first plaintiff was acting lawfully. Within his rights. It was the defendants who were not. It is clear that the defendant and its employees/agents had no lawful excuse to assault the first plaintiff. They are liable in assault.

We find no reason to come to a different conclusion. We therefore reject the appellants' contention that the first respondent was not assaulted.

We now refer to the question of damages. A court of appeal will generally not interfere as to the question of damages by re-assessment of damages save on the grounds that the trial Court either acted on a wrong principle of law or had made an entirely erroneous estimate of the damages. A court of appeal: "*will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages, it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an extremely erroneous estimate of the damage to which the plaintiff is entitled*" ***Flint Vs. Lovelt*** *1935 (1) KB 354.*

The normal measure of damages for trespass to land is the diminution of the value of the land – **Chiwaya Vs Sedom** [1991] 14 MLR 47 at page 55. And where actual damage has been occasioned the claimant is entitled to full compensation – **Munthal Vs Mwakasungula** [1991] 14 MLR 298 at page 309.

In making the award, the High Court observed thus:

> *"That the land in issue was a tourist resort has not been disputed. It has also not been disputed that the trespass resulted into potholed pavement that resulted in injury to tourists and closure of the resort. We also take cognizance of the fact that the plaintiff did somewhat exaggerate when he said that the trespass was with heavy construction plant. It is true however that there was trespass and that it resulted in the denigration (**sic**) of not just the land but the resort itself. The trespass was clearly done with some impunity and in total disregard of a court order. It is also obvious that the defendants were motivated by personal gains i.e. the need to save on construction costs at the expense of the plaintiffs".*

We have ourselves examined the evidence very carefully. It appears to us that not only did the Respondent exaggerate when he said that the trespass was done with heavy construction plant but that he actually lied because there was nothing of that sort; the evidence is that wheelbarrows were used. We cannot help thinking that most of the evidence is highly suspect and exaggerated, especially that Messrs Mwafulirwa and Mhone, former directors/shareholders of Chikale Beach Resort Limited, do not now get on at all. Besides, the evidence does not portray the picture as to the extent of the diminution of the value of the land, the extent to which the appellants may be said to have been responsible for such diminution, the period of closure of the resort (if at all) and the loss attributable thereto, and as to the motivation for personal gain. We have also been unable to find any evidence that any tourist was injured at the premises.

In the light of all this, we are of the view that the High Court took into account that which it should not have considered and, therefore, that the award of K3,500,000.00 was, in our judgment, an extremely erroneous estimate of the damages to which the first respondent was entitle. We would, therefore, re-assess the award,

especially bearing in mind the appellants' disregard for the Court Order restraining them from trespassing to the land in question, to K200,000.00.

Regarding damages for assault the High Court observed thus:

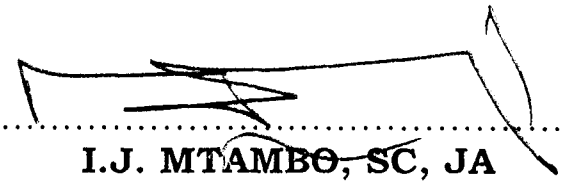
> *"....we realize that the first plaintiff did again exaggerate when he said he sustained a broken leg. There cannot however be denying the fact that he did sustain pain and suffering. He was also assaulted in a most humiliating fashion. Before not just his employees but also tourists. He suffered the ultimate humiliation. Clearly the idea was not just to injure him but also to humiliate him."*

Here too, the evidence appears to be suspect and exaggerated. It was not mere exaggeration when the respondent said that he suffered a broken leg, but a lie; there was nothing of the kind, according to the evidence. Besides, it does not seem to us, on the evidence, that the first respondent can be said to have been assaulted in the *"most humiliating fashion"* or that he suffered *"the ultimate humiliation,"* as the trial Court would have us think.

For the same reasons as we have given above when we considered damages for trespass, we think that the award of K450,000 for assault was, in our view, an extremely erroneous estimate of the damages to which the first respondent was entitled. We therefore re-assess the award to K100,000.

The up-shot of all this is that the appeal against the findings of trespass and assault is dismissed. The appeal succeeds as to damages in that the same have been re-assessed downwards – K200,000.00 for trespass and K100,000.00 for assault making a total of K300,000.00. In the circumstances each party will bear own costs, and we so order.

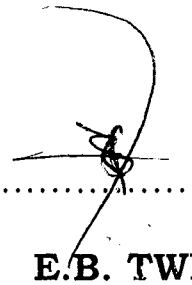
DELIVERED in Open Court this 4th day of November, 2010 at Blantyre.

Signed:  .....

I.J. MTAMBO, SC, JA

Signed:  .....

E.M. SINGINI, SC, JA

Signed:  .....

E.B. TWEA, JA