IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 658 OF 1993

BETWEEN:

ALFRED E. NAMATA..... PLAINTIFF

AND

THE ATTORNEY GENERAL ..... DEFENDANT

CORAM: MWAUNGULU, J

Nyirenda, Counsel for the Plaintiff

Chigawa, Counsel for the Defendant

Mkandawire, Recording Officer

Mwaungulu, J

O R D E R

In this action the Plaintiff, Mr. A. Namata, is claiming from the Malawi Government damages for trespass. The action was taken out on the 20th of May 1993 when the plaintiff was claiming the value of the building, the interest charged by the New Building Society on the loan that had already been disbursed to the plaintiff; interest charged by the New Society at 7% per annum from the date of approval of the advance to completion of the building; rental value up from the date of judgment; increased cost of completing the building and exemplary damages for trespass to land. The judgment being obtained by default, the only issue before me is the amount of damages that the plaintiff should be awarded for the trespass. To ascertain what should be paid for the trespass, it is useful to know what happened in this matter.

The plaintiff, an ordinary citizen, until he moved to Naming'omba Estate where he is working now, was in Mzuzu. In Mzuzu he acquired a plot along Chinula Crescent for construction of a house. He started constructing the house, first from such resources as he could muster. Later he was given a loan by the New Building Society.

At the time of construction, there was a waiting tenant, Brown and Clapperton Ltd., to rent the building at K2, 000 per month. The house was to be completed by the month of

June 1992.

By September 1991, the amount disbursed on the house by the plaintiff and the New Building Society was K8, 420. The Building Society had disbursed K4, 210 for which the plaintiff is up to now being charged, according to the agreement, interest at varying rates.

In September 1991 there was a Nationals Convention of the Malawi Congress Party in Mzuzu. A political rally was to follow. The place earmarked for the rally was near Chinula Crescent where the plaintiff's house was being erected. The house was at window level. In that month and that year officials from Ministry of Works, without consulting the plaintiff and, it now appears, at the orders of the Regional Chairman of the Malawi Congress Party in the North, demolished the plaintiff's house for the political rally.

On the 15th November 1991 the New Building Society wrote to the plaintiff that since the substratum of the mortgage had been destroyed the plaintiff was in breach of the New Building Society Act. The Society was, however, willing to assist the plaintiff to build the house. It wanted to hear from the plaintiff on the next move and, if the plaintiff did not respond, the Society would withdraw the mortgage and claim a refund of what it had already paid out to the plaintiff. The plaintiff told this Court that he could not raise money to continue with the building. He started the process of getting the money from the Malawi Government.

On 15th February 1992 Brown and Clapperton Ltd., who were hoping to occupy the house by June 1992, withdrew their arrangement to rent the house from that year. By that time the New Building Society was willing to continue to render their facilities to the plaintiff. It is clear from their letter of 3rd June 1992 that they were ready to build the house if there was a substantial contribution from the defendant. They, therefore, wanted to know how much it was that government can pay so that they could authorise the loan.

The estimate of building was based on the same drawings of the demolished house. Phiri Building Contractors Ltd. offered to build the house at K168, 987.95 in their letter of 29th April 1993. This formed the basis of the mortgage application to the New Building Society. The New Building Society, however, could only provide a loan of K55, 194 on the agreed rentals of the house of K1, 500 per month. The plaintiff was advised to pay the rest of the money. He could not raise the money. Government has not paid. This is why he has come to Court.

The question of damages awarded in an action for trespass has been considered by this Court. The purpose of damages is to bring the victim status quo ante by awarding him for all reasonable loss caused by the wrongdoers action or omission. In relation to trespass to land the measure of damages is the loss of the land or its diminution in value (Steel Fabrication Industries V Norse International Limited) (1984) Civ. Cas. No. 269, unreported; Unango Estates Ltd and another V Michael (1983) Civ. Cas. No. 487; Hara V Malawi Housing Corporation (1990) Civ cas. No. 1171. The Court, however, will also award consequential loss where that flows directly from the trespass on the land. Here the substratum of the land was destroyed by the defendant's trespass. As we have seen, there was consequential loss. The plaintiff is entitled to the loss of the building and

consequential loss.

In relation to the damages for destruction of the house the measure of damages is the cost of replacement at the time of the trespass. This is the starting point. It is not unoften that the value of the substratum destroyed by the defendant's wrong will be less than its value at the time of trespass. This is not the situation here. The converse is what is the case here, that is to say, that the value of replacing the substratum has increased since the wrong. In such a case it is only reasonable that the measure of damages should not be on the date of the wrong but some later date. The reason is that such an award achieves the purpose of damages which is to leave the victim in the same position as he was, namely, to have the substratum. A contrary view would certainly only benefit the wrongdoer. This would be contrary to public policy.

In the application of this principle to the case at hand, it is apparent that the way the heads of claim have been made for the plaintiff there could be an overlap. The plaintiff claims the value of the building in K8, 420 and the increased cost of completing the building. It is true that the plaintiff expended money to bring the house to where it was when it was demolished. He has, however, to start all over again. If the defendant pays him the increased cost of completing the building it will be such that the plaintiff will have to start all over. There cannot, therefore, also be a claim for the value of the building. There is a way to avoid this overlap which is justified on the evidence as was before me.

As we have seen from the letter from the New Building Society, the society could only give the plaintiff K55, 194 when the actual cost of the building was K170, 000. At the time the house was destroyed the plaintiff had already qualified to obtain the loan after his contribution toward the construction of the house. In other words, by the time the plaintiff qualified for the loan from the society, the plaintiff had brought the building to the level where the society could only complement his efforts to finish the building. What this means is that in February 1994 the New Building Society could only give the loan of K55, 194 after the plaintiff had himself contributed the difference. The plaintiff could only qualify the loan if he raised the difference. The mortgage from the Society was the only way to the plaintiff to complete the building. When the house was demolished by the defendant, the plaintiff had already qualified for the loan to complete the house by making his contribution. The value of the demolished house is therefore the difference between the amount the New Building Society would have given the plaintiff to finish the house and the cost of completing the building. The defendant must, therefore, pay such money as would enable the plaintiff with the contribution from the New Building Society to complete the house. This in my judgment is the difference between K171, 000 and K55, 194. The plaintiff will recover K115, 806. This represents the increased cost of completing the building. It is not necessary to award for the value of the building.

The effect of the defendants trespass is that the plaintiff has to find extra funds to rebuild the house. It follows that his obligation to the New Building Soc has to be paid though the house has to be built using new funds. The plaintiff is, therefore, entitled to have the trespasser pay for the loan from the New Building Society at the rates of the Society till

payment.

In my judgment there cannot be a claim for interest for the amount of a loan approved by the Society for completion of the building. The Society would only have claimed interest itself if it had actually disbursed the funds to the plaintiff. The New Building Society is in fact claiming for the amount actually disbursed by them. Of the amount it approved only K4, 210 was paid. This is the amount the Society can claim interest on. The plaintiff cannot properly claim interest for money that has not been disbursed.

The plaintiff is, however, not entitled to the loss of rent. This has been treated as consequential loss by the plaintiff. If the rent is paid and the plaintiff is given the value of the house, there is a possibility of overlap. Once a chattel or land has been destroyed one must also look at the possibility that the house could have been destroyed in future. Equally there is a possibility that no tenant could have been in place. While a claim for rent then may be a whole possibility, the fairer thing would be to capitalise the value of the building rather than award prospective rentals. The value of the house actually destroyed will be capitalised. The interest will run up to the date of payment. The interest will be at 1% above the lending rate at any point in time.

The claims for aggravated damages for trespass are justified. Trespass is actionable without proof of damage. Where, like here, there is reason for awarding aggravated and exemplary damages, Courts have always done so Mleme V Pantazis t/a Escoli Estates (1987) Civ. Cas. No. 666. The Ministry of Works should not have done what it did and in the matter it did it. The plaintiff will have K10, 000 as aggravated damage.

Made in Chambers this 23rd day of May 1997 at Blantyre.

D.F. Mwaungulu

JUDGE