

The Judiciary

IN THE HIGH COURT OF MALAWI

MZUZU REGISTRY

CIVIL CAUSE NUMBER 123 OF 2015

BETWEEN

JUDA BIHO GAUSIPLAINTIFF

AND

HON ATTORNEY GENERAL (CHIEF COMMISSIONER OF
PRISONS).....DEFENDANT

CORAM: B. SAMBO, ASSISTANT REGISTRAR (Ag)

Chinkhuntha, of counsel (on brief) for the Plaintiff

Defendant, absent and unrepresented

Mr. H. Kachingwe, Clerk/Official Interpreter

Sambo, AR

**ORDER ON ASSESSMENT OF COMPENSATION FOR LOSS OF USE AND
OCCUPATION OF CUSTOMARY LAND**

1. BACKGROUND

The Claimant, Juda Biho Gausi commenced this action on 4th August, 2016 by way of writ of summons claiming compensation for the land compulsorily acquired by the Defendant, compensation for the 390 banana plants destroyed by the Defendant at the total sum of MK312,000.00, ~~damages for mental anguish and~~ psychological torture, other reliefs and costs of this action.

The Plaintiff is a resident of Mzimba district and is a citizen of the Republic of Malawi while the Defendant is standing on behalf of the Chief Commissioner of Prisons.

In or about the year of 2007 the Defendant constructed the new Mzimba Prison, a drainage for which was constructed across the Plaintiff's land; land which he held, occupied and used under custom. In the process of constructing the open drainage system, the Defendant destroyed 390 banana plants.

The acts of the Defendant caused the Plaintiff to lose use and occupation of the land for which the Defendant was legally required to compensate the Plaintiff but did not do so.

In these premises, it is now averred by the Plaintiff that the conduct by the Defendant was arbitrary in that the Plaintiff was supposed to be compensated for the land and the destroyed banana plants.

The matter was before Hon. Justice M.C.C. Mkandawire. In conclusion, he found the Defendant liable. For the avoidance of doubt, this is what the honourable judge said in the last paragraph of his judgment;

"There is, instead, overwhelming evidence against the Defendant that in 2007, the Defendant forcibly took land that belonged to the Plaintiff. The Defendants also uprooted 390 banana fruits for the Plaintiff. The Defendant has not compensated the Plaintiff for this. I find that the Plaintiff has proved his case. The Defendant is hereby found liable with costs. I order that the Registrar at Mzuzu High Court Registry should assess the level of compensation."

This assessment, therefore, is only with regard to the loss of use and occupation of the said customary land, and loss of 390 banana plants let alone costs of this action.

2. ISSUE

The hearing was conducted to assess the quantum of damages payable for loss of use and occupation of land and loss of 390 banana plants.

3. LAW APPLICABLE

Although I am hearing this assessment today, the 15th of May, 2018, the cause of action rose way back in 2007. The Land Act, 2016, was not yet in force but the Land Act, 1965. I think I would be unjustified to produce my order of assessment herein based on the Act of 2017. The principle remains that laws must not operate retrospectively.

4. DETERMINATION

I have carefully considered the skeletal arguments submitted along for this assessment. I want to thank counsel for the guidance given me on the law and the authorities cited in support of their submissions. Where appropriate, I will take into account these submissions in my order. I must also thank the witness for his testimony. I believe such testimony will assist me determine the appropriate level of damages to award in each instance.

I want to begin my assessment in this way.

Generally, one is compensated for loss of something that belongs to him or her. The claim herein, significantly, is multifaceted as regards property ownership. Admittedly, the Plaintiff has property in both the customary land taken away from him by the government and the 390 banana plants. However, he enjoyed exclusive ownership of bananas, only and not the customary land he was in occupation and use. While people in Malawi have property in customary land, the government of Malawi enjoys a greater part of the same.

Section 25 of the Land Act provides:-

25. All customary land is hereby declared to be the lawful and undoubted property of the people of Malawi and is vested in perpetuity in the President for the purposes of this Act.

While section 26 states:

26. Minister to administer and control customary land and mineral rights thereof.

The Minister shall, subject to this Act, and to any other law for the time being in force, administer and control all customary land and all minerals in, under or upon any customary land, for the use or common benefit, direct or indirect, of the inhabitants of Malawi:

Provided that a Chief may, subject to the general or special directions of the Minister, authorize the use and occupation of any customary land within his area, in accordance with customary law.

By its very nature, customary land is communal and cannot be privately owned. This position was reiterated by the High Court in **Malera Kanyashu v Petros Chapita Kuwali**, HC, Civil Cause No. 109 of 2010 as follows:

"Ownership of customary land is alien to our law".

It is only the value of customary land offered, as a share and contribution to joint ventures or investment projects is supposed to be assessed depending on the use, location of the land, and the intrinsic quality of the land itself. However, Section 28 of the Land Act allows compensation to individuals for loss, damage or disturbance, only. It reads as follows:

Sec 28(c)...the temporary use and occupation of customary land under section 27 (2), suffers any disturbance of, or loss or damage to any interest which he may have or, immediately prior to the happening of any of the events above mentioned in this section, may have had in such land, shall be paid such compensation for such disturbance, loss or damage as shall be reasonable. (The underlining is supplied).

The law above recognizes that acquisition or usage of customary land by government may cause the following inconveniences and lead to the following problems for the user/occupier and/or his or her neighbours:

- loss of home;
- limitation of usage of land;
- Loss of land value.

A possible solution of these problems may be a fair compensation to the land owner, as follows:

- compensation based on the market value of the land;

- compensation of depreciation of value, if only part of the land was expropriated;
- disturbance compensation, paid mostly for occupiers for costs and expenses incurred by moving;
- Providing the owner with equitable accommodation, where accommodation was removed.

In the instant case, the Plaintiff lost usage and occupation of the land and hence he shall be compensated for loss of use and occupation of the land let alone disturbance. He shall also be paid compensation for the loss of his 390 banana plants.

I am mindful that in determining damages generally, one has to bear in mind that the general principle on which damages are assessed is restitution. In claims for tort, the law seeks to award damages that give the party injured reparation for the wrong committed against them (see **Admiralty Commissioners -v- S. S. Susquehanna** [1926] A.C. 655 at 661 per Viscount Dunedin). In calculating damages, therefore, the courts consider, in monetary terms, the sum which will make good to the sufferer, as far as money can do, the loss he has suffered as a result of the wrong done (see **Admiralty Commissioners -v- S. S. Valeria** [1922] 1 A.C. 242 at 248). In arriving at a sum of money to be given for reparation, authority is settled that where any tort is to be compensated by damages, as nearly as possible, the court should award a sum of money that will put the injured party in the same position he would have been in had he had not suffered the wrong for which he gets compensation or reparation (see **Livingstone -v- Rawvards Coal Co** (1880) 5 A.C. 25, per Lord Blackburn). In **Namwivo -v- Semu et al** (1993) 16 (1) MLR 369, Msosa J., as she then was, said that,

"... simply put, this means putting the plaintiff [back] into a position he would have been in had the tort not been committed."

In this case, the deprivation is permanent; the Plaintiff has lost his property in this particular land for good. According to the evidence before me, the magnitude of the land in question is substantial. His banana plantation also got wasted in the process. The government ought to have followed proper land acquisition procedures laid down in the law much as it reserves the power to acquire land from customary land. ~~Gone are the days when Malawian should be treated as aliens in their own motherland.~~

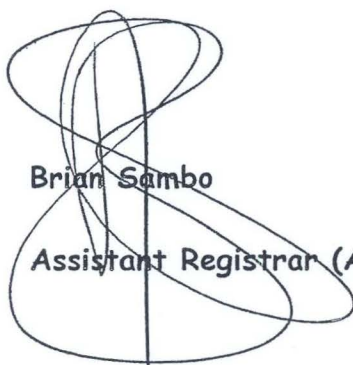
Considering all the circumstances of this matter, I award the Plaintiff as follows:

- i. MK3, 500,000.00 being compensation for loss of use and occupation of the land.
- ii. MK312, 000.00 being compensation for loss of 390 banana plants valued at MK800.00 per plant.

In conclusion, the Defendant is required to pay MK3, 812,000.00. This compensation is payable within 14 days from today.

Costs are for the Plaintiff, and shall be assessed, accordingly.

Made in chambers today the 20th of July, 2018.


Brian Sambo
Assistant Registrar (Ag)