IN THE HIGH COURT OF MALAWI, BLANTYRE

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 26 OF 1986

BETWEEN:

H.E. SUNDU ..... PLAINTIFF

- and -

PRESS FURNITURE & JOINERY LTD. ..... DEFENDANT

Coram: MBALAME, J.

Saidi, Counsel for the Plaintiff
Hanjahanja, Counsel for the Defendant
Mkumbira, Official Interpreter
Gausi (Mrs.)/Manda, Court Reporters

J U D G M E N T

By his statement of claim the plaintiff in this action claims damages against the defendant for trespass to land, trespass to goods, conversion and detenue. It is his case that he is a tenant at Plot No. BW/161A located on Henderson Street in Blantyre and that on the 14th day of October, 1985, the defendant's servants and/or agents wrongfully entered the said premises in his absence, but in the presence of his relatives and family and removed therefrom a Nasolo Lounge Suite which he purchased from the defendant on credit terms. He contends that the defendant's servants or agents did this maliciously, out of spite and with an intention of humilating him and injuring his proper feelings, dignity, pride and causing him to be held up to ridicule and contempt before his wife, family, relatives, friends and neighbours. He contends that other than forcifully and unlawfully removing the said Nasolo Lounge Suite the defendant has wrongfully deprived him, and continues so to do, of the said suite the value of which is K848.12. The plaintiff, therefore, prays for a declaration that the said lounge suite is his property, for an injunction restraining the defendant or its servants from selling, disposing of or in anyway dealing with the suite without his consent, an order for delivery up by the defendant to the plaintiff of the said suite or its value, and damages for its detention and/or conversion and, of course, for the costs of this action.

2/.....

In its re-amended defence the defendant contends that it sold the suite in question to the plaintiff on a 12 months' instalment sale agreement, payments of which were to commence from the month of February, 1985, to January, 1986, at the rate of K72.82 per month. It is contended that since it was an implied term of the agreement that should the plaintiff default in paying any single instalment the defendant would be entitled to either repossess the furniture or institute legal proceedings for recovery of the arrears, and the plaintiff having been six months in arrears of an amount of K436.92 on 14th October, 1985, the defendant opted to exercise its right of repossession. It is further contended that the action of trespass to land cannot be maintained as the plaintiff had no property in the land and was not in possession of the premises as a title holder when the defendant entered the premises. It is also contended that the defendant entered the premises and removed the furniture therefrom with the plaintiff's full authority, licence and or leave of both the plaintiff and or his wife.

Pleading in the alternative the defendant contends that the agreement entered into between the parties was made under the provisions of the Hire Purchase Act, Cap. 48:05 of the Laws of Malawi and that since this was an instalments sale agreement and by usage of trade custom the defendant was entitled to terminate the said agreement and seek the return of its goods, a thing which was done with leave and licence of the plaintiff.

The plaintiff gave evidence. He said he bought the suite in question from the defendant on instalment credit terms and that monthly instalments were to be deducted by his employer, Brown & Clapperton Limited and remitted to the defendant over a period of 12 months. In order to effect this he signed Ex.P1, which is the defendant's "application for instalment credit form" and Ex.P2 being a stop order form by the plaintiff to his salaries officer authorising him to deduct from the plaintiff's salary a sum of K72.82 each month from 28th February, 1985, to 28th January, 1986. He then finally collected the furniture two weeks later and signed the defendant's invoice No. 11212 now Ex.D8.

Giving evidence over the incident of 14th October, 1985, the plaintiff said he on the afternoon of that day, at about 2.00 p.m., was in his office at Brown & Clapperton Ltd. when his eleven-year old daughter came to inform him that his wife wanted him urgently at the house. As the house is only about 50 metres away he sped there only to find the defendant's van parked outside his house and loaded on it was the furniture which is the subject matter of the case. He talked to one of the four people who had come with the van and was informed that they had repossessed the furniture for lack of payment and they would only return it on full payment of the money owing. Having

3/.....

failed to compromise with them he left his wife with them and returned to his office. He said he neither allowed them to collect the furniture nor did he authorise his wife to let them collect it. In respect of the repayment instalments he was adamant that deductions had been made by his employer from his salary during the months of February, March, April, June and August, 1986. He said this was reflected on his monthly slips although he did not produce any of these.

The plaintiff's wife was PW2. It was her story that on 14th October, 1985, she was with a visiting relation from Zimbabwe when at about 2.00 p.m. a man from the defendant knocked at the door of the house. He introduced himself as coming from Press Furniture and Joinery and said he had come to repossess the Nasolo Lounge Suite as her husband was not up-to-date in his repayments. She tried to plead with him to go and talk to her husband first and further asked him not to remove the furniture that time as shehad the visitor from Zimbabwe and three sisters in the house that afternoon but to no avail. She then went into the kitchen and asked her eleven-year old daughter to go and call the plaintiff. When she came back part of the furniture was already loaded on the van. She was then given Ex.P4 to sign. By the time her husband came they had completed loading. She said immediately the plaintiff came she left for her bedroom because she was very upset and distressed. She emphatically denied ever allowing the four people from Press Furniture to enter the house or to remove the furniture but, however, said they did not use any force in taking the chairs. Her evidence concluded the case for the plaintiff.

The defence called four witnesses. I will deal with the evidence of DW1, Ernest Alleyabu, who said he was the defendant's debtors controller. He said he dealt with the plaintiff on 21st January, 1985, when the latter applied for instalment credit terms to buy a Nasolo Lounge Suite. He said the application was approved on 30th January, 1985, after the plaintiff's employers confirmed the stop order for the agreed monthly instalments in favour of the defendant.

Explaining the scheme he said there were two types of credit terms. Under the first, one paid 25% of the purchase price before collecting the goods and paid the rest by monthly instalments thereafter whereas under the second the purchaser paid 12 equal instalments and collected the goods before paying a single instalment. In both cases the defendant has power to repossess the goods if the buyer defaulted any single instalment. This he concluded was well known to all the defendant's customers. He said the plaintiff was no exception and was verbally told of this on 21st January, 1985.

4/.....

After the plaintiff collected the furniture on 4th February, 1986, the defendant only received two instalments from Brown & Clapperton Ltd. and during the five to six months that followed he telephoned, visited and wrote the plaintiff reminding him of his obligation but without success. The first written reminder was sent on 2nd September, 1985, (Ex.D9) and the final on 3rd October, 1985 (Ex.D10), thereafter it was decided that the goods should be repossessed. On 14th October he instructed Scott Kabera, his debt collector, to go and repossess the goods.

Mr. Scott Kabera was DW2 and told this Court that on 14th October, 1985, he was instructed by DW1 to go and repossess a nasolo lounge suite from the plaintiff's house. He,in the company of a workmate, Peter Phiri, DW3, went to the plaintiff's office on that afternoon and told him of their mission. The plaintiff pleaded with them and promised to pay the arrears immediately his wife received money which she was expecting from her employers. This was not acceptable to the witness as he had strict instructions to repossess. While in the plaintiff's office there came a telephone call for DW3 from a lady in an adjacent office and the plaintiff permitted Mr. Phiri to talk to her. They then left the plaintiff's office for his house. While still in the premises of Brown & Clapperton waiting for the plaintiff who had gone to that company's accounts department they met and spoke with DW4, Mr. Gondwe, another of the defendant's debtors. This was confirmed by DW4 in this Court. When the plaintiff returned they then walked to his house following the van they had brought in which there was a driver and a loader. On reaching the house PW2 opened the door for them and the parties were accordingly introduced by the plaintiff who later told PW2 the reason for their visit. She tried to plead with them not to remove the furniture in front of her visitor and promised she would pay them the balance at a later date as she was expecting money from her ministry headquarters in Lilongwe. As this was not acceptable the plaintiff left and told the wife to deal with the party. They loaded the furniture and made PW2 sign a document, Ex. P4, which he told her would assist her in reclaiming the goods when she received the money she was expecting. The evidence of DW3 is more or less on the same line as that of DW2 and I do not seek to narrate it here; suffice to say I thought he was a truthful witness and so was DW4.

I now turn to the first cause of action, namely that of trespass to land. It is submitted by Counsel for the defendant that the plaintiff can not maintain this cause of action because he has no estate in the land as he lived in the house belonging to his master by virtue

of his employment. He has cited paragraph 1325 of Clerk and Lindsell on Torts 14th Edition as authority for this proposition. It would appear that according to that authority if an owner of the premises does not intend to treat the occupier as a tenant, then mere occupation of the premises by consent of the owner does not amount to occupation. Counsel has further argued that the plaintiff in this case is in that house for the better discharge of his duties and therefore cannot maintain the action. With respect in the instant case there is evidence that the plaintiff pays a monthly rent of K25.00 to his employers. This has not been disputed and such rental would, in my judgment seem to constitute tenancy. Furthermore the defence has not proved or led any evidence to show that the plaintiff's "occupation" of the house is strictly for the better discharge of his duties. This was put to him and he denied it. He said he would live anywhere and still be able to work as a Stores Internal Auditor.

Trespass is generally actionable at the suit of the person in possession of the land. Indeed a person in possession can sue although he neither is the owner nor derives title from the owner. In the case of a building, possession is evidenced by occupation or if unoccupied by possession of the key or other method of entry. See the case of Jewish Maternity Society's Trustees v. Garfinkle (1926) 95 L.J.K.B. 766 and paragraph 1318 of Clerk and Lindsell on Torts, 14th Edition, p.762. The plaintiff in this case may, therefore, sue in trespass.

I have carefully considered what the plaintiff and his only witness said in respect of how the defendant's servants found their way to the house vis-a-vis that of DW2 and DW3. I thought the defence story was the more probable one and was indeed supported by DW4, who is not only an independent witness but a fellow employee of the plaintiff. Both the plaintiff and his wife said their eleven-year daughter was sent to call the plaintiff from his office and yet this crucial witness was not called to give evidence. The wife, PW2, said when the defendant's servants arrived her three sisters were in the kitchen and that it was from there that she sent her daughter to the plaintiff's office. Surprisingly none of these three sisters was called although they reside in the City of Blantyre. In the end result I find that the evidence of the plaintiff and his wife does not tell the truth on how the defendant's servants came to the house. The plaintiff's story was, in my judgment, an attempt to improve on his case by misleading this Court. On the other hand the defendant's servants gave their evidence in a forthright manner showing no sign of hesitation and their story, besides being consistent with the rest of the evidence, is independently corroborated. I, therefore, find as a fact that DW2 and DW3 were escorted by the plaintiff to

the house where they were introduced to his wife and having refused to entertain the pleas by the plaintiff and his wife they decided to remove the furniture. In my judgment there was nothing unlawful in entering the premises and into the house as this was under licence from the plaintiff. I, therefore, dismiss the claim for trespass to land with costs.

I now turn to the remaining claims, i.e. those of trespass to goods, conversion and detinue. Having held that the servants of the defendant entered the house lawfully I now have to consider whether the act of taking away the furniture was unlawful. I have held above that I do not believe the plaintiff and his wife regarding how the defendant's servants entered their land. I have however to decide the rest of the case independent of that aspect in the light of the evidence before me. Indeed as was held in the case of Parojcis v. Parojcis (1958) 1 W.L.R. p.1280 and followed in the case of Mahomed Nasim Sirdar v. Rep. (1968-70) A.L.R. (Mal.) p.212, because a witness has told a lie on one point, it does not follow that he must necessarily be disbelieved on all issues for it is indeed not unknown for people to fall into the error of lying in order to improve what may already be good case. It is common case for both the plaintiff and the defendant that the plaintiff did not wish to part with the furniture from the time he was approached at the office to the time he left the defendant's servants with his wife. This is not in dispute. It was the case for the defence that after the plaintiff had left the house the wife gave them permission to take the furniture. In her evidence she categorically denied this and said she could not do that having had no authority from her husband. She said she was not a party to the deal. She said she was herself unwilling to see the furniture go. Finally, emphasis was laid on Ex.P4, the document of repossession. It is probably proper to recast it. It reads as follows:

> "14th October, 1985
>
> This is to certify that Press Furniture and Joinery Limited has repossessed Nasolo Lounge Suite from Mr. Sundu's house at B & C on this day.
>
> Repossessed by ..... (Signature of Scott Kabela)
>
> Witnessed by ..... (Signature of Peter Phiri)
>
> in the presence of .... (Signature of Mrs. Sundu)
>
> Date : 14th October, 1985"

It is to be noted from this exhibit that it does not grant any authority by Mrs. Sundu to the two gentlemen who signed it to remove the furniture. It is a certificate to the effect that the furniture was removed in her presence and that i all. Indeed both DW2 and DW3 said it was to be used when reclaiming the furniture. From the facts before me I find that the furniture was taken without the consent of either the plaintiff or his wife.

The next question to be decided is whether the defendant, through its servants, was justified in removing (repossessing) the furniture from the plaintiff. In its defence the defendant contends it was the owner of the furniture under the provisions of the Hire Purchast Act, Cap.48:05 in that by an "Instalment Sale Agreement" dated 21st January, 1985, evidenced by an invoice dated 4th February, 1985, and by "usage of trade" the furniture was sold to the plaintiff on the understanding that should any instalment be in arrear at any time and remain unpaid or should he fail to comply with any of the provisions thereof, then the defendant would be entitled to repossess the furniture.

I have carefully examined Ex.P1, which the defendant alleges is the contractual document. The heading on that document is:

"Press Furniture and Joinery Limited

Application for Instalment Credit"

It then provides for

1) Names and particulars of the applicant including his private village address.

2) Land Lord's address, house and office telephone numbers.

3) Marital status and number of children, occupation and Bankers.

4) The amount of credit applied for and applicant's income per month.

5) The monthly instalments and the period payable.

6) Credit referees and signature of the applicant and a guarantor.

There is then the final column "For Official Use" which would appear to bear the signature of the person authorising the "Application for Instalment Credit."

Suffice to say the plaintiff signed this exhibit on 21st January, 1985, and the defendant approved it on 30th January, 1985.

It is submitted that this coupled with the invoice of 4th February, 1985, constituted an "instalment sale agreement" under the Hire Purchase Act.

The Hire Purchase Act defines "agreement" as meaning:

"A hire purchase agreement or an instalment agreement";

Under the same Act an "instalment sale agreement" means any contract of sale under which:

(a) the ownership in the goods sold passes either before or after delivery;

(b) the purchase price is to be paid in instalment, of which one or one are paid after delivery; and

(c) the seller is entitled to the return of the goods sold if the purchaser fails provisions thereof;

Then comes section 6(1)(c) which is in the following terms:

"6(1)(c) Every agreement shall set out the terms as to the reservation and passing of ownership of the goods or as to the seller's right to the return of the goods, as the case may be."

Section 6(3) is to the effect that if an agreement does not comply with the foregoing, then the goods which are the subject of the agreement shall be deemed to have been sold to the purchaser without any reservation as to the ownership of the goods or, as the case may be without any stipulation as to the seller's right to the return of the goods and shall be deemed to have been sold to the purchaser on credit at a price, payable in the same manner as that stipulated in the agreement.

9/.....

On careful examination of Ex.P1, I find that it does not, on its own, create a binding contract of sale. With respect it is what it says, it is an "Application for Credit" and no more. It bears two dates, i.e. the 21st January of 1985 when the plaintiff applied for the instalment credit terms and the 30th of January when an official from the defendant company approved it. The words in that whole document must, in the absence of a special meaning be given their natural one. In determining the meaning of the words I am guided by the case of Kikness v. John Hudson and Company Ltd. (1955) A.C.696 per Viscount Simonds at p.712 and that of E.X.P. Athwar (1877) 5 Ch.D. 30. In determining the words in this document I must ask myself whether the words are clear or not. When once the meaning is plain it is not, in my judgment, the province of this Court to scan its wisdom or policy.

The document in question cannot be said to be an agreement of sale, worse still what Counsel contends it is, an "instalment sale agreement" under the Hire Purchase Act. In my judgment the sale must have been concluded after the 31st January, 1985, when the invoice was issued, i.e. on 4th February, 1986. This is the only evidence of a contract of sale. Coupled with Ex.P1 I find that there was a sale of the suite on credit terms and that the title in the goods passed to the plaintiff without any condition. I am more confirmed in this view in that after this case arose the defendant immediately introduced a proper format of an "instalment sale agreement" Ex.P7 which its new customers now sign. It was the evidence of DW1, DW2 and DW3 that the defendant found it necessary to change Ex.P1 because of the case at hand. On the evidence before me, therefore, I find as a fact and hold that the defendant did not have title in the goods at the time it purported to repossess them from the plaintiff. I therefore grant the declaration sought by the plaintiff to the effect that the lounge suite is the property of the plaintiff.

Trespass to goods is basically a direct interference with the goods of another by the defendant. To prove this tort all what is necessary is that there has been an improper handling of the goods. Indeed in some cases possession of the goods may not even have been disturbed. In the instant case I have already held that the defendant's servants had no authority from the plaintiff to handle the suite at his house. That action was a direct and wrongful interference with the plaintiff's chattels by the defendant through its servants. The plaintiff succeeds on this claim with costs. I award general damages of K50.00 on this head.

I now turn to the question of conversion and detinue. Counsel for the defendant has argued that the plaintiff cannot claim on both heads at the same time as the two can only be pleaded in the alternative. He has referred to this Court a text book, Modern Tort Cases by G.H.L.Friedman,

as authority for that proposition. With respect much as that may be the case at times there is no general rule to that effect. Indeed the author of that very book, at page 243, says that where goods have been totally (and wrongfully) destroyed by the defendant he may be liable in all the three torts : trespass for the damage; conversion for the conduct which denies the plaintiff's title; detinue for wrongful retention of the plaintiff's goods. Conversion and detinue are two different torts altogether. In the case of General and Finance Facilities v. Cooks Cars (1963) 2 All E.R. 314 pages 317-319 Diplock, J. said:

> "There are important distinctions between a cause of action in conversion and a cause of action in detinue. The former is a single wrongful act and the cause of action accrues at the date of of the conversion; the latter is continuing cause of action which accrues at the date of the wrongful refusal to deliver up the goods and continues until the delivery up of the goods or judgment in the action for detinue."

The law is therefore clear that the two being separate a plaintiff may claim in either of them in separate actions, or plead both in the alternative or indeed claim on both heads in one action whichever is practical. In the instant case the plaintiff is claiming for damages in detinue and/or conversion. I see nothing wrong with the pleadings. Indeed even Bullen and Leak 12th Edition provides for such pleading at page 360. See form 160. Conversion as defined in the case of Moorgate Mercantile Co. Ltd. v. Finch (1962) 2 All E.R. 467 quoting the definition in Salmond on Torts 12th Edition p.254 para. 73 : 10 is said to be:

> "..... an act of wilful interference without lawful justification, with any chattel in a manner inconsistent with the right of another, whereby the other is deprived of the use and possession of it. Two elements are combined in such interference :
> (1) a dealing with the chattel in a manner inconsistent with the right of the person entitled to it and
> (2) and intention in so doing to deny that person's right or to assert a right which is in fact inconsistent with such right."

In my judgment what the defendant's servants did to and with the furniture on the afternoon of the 14th of October, 1985, was inconsistent with the rights of the plaintiff, who was entitled to it. They intended to deny him of that right. I find for the plaintiff on this head.

11/.....

MR. HANJAHANJA: I pray for stay execution further proceedings in this matter pending appeal. The money should be paid into Court pending appeal.

MR. SAIDI: I object to the application. There is no evidence in this Court to prove that plaintiff is man of straw.

By Malawian standard K600 per month is not unreasonable.

Wife also works. She even got a car loan. I object to payment of damages into Court.

COSTS

I am willing to undertake to repay costs in the event of a successful appeal by defendant.

O R D E R

Stay of execution of the judgment would, in the circumstances, mean denying the plaintiff of the fruits of his litigation. Delaying execution would in the circumstances again mean justice denied. I disallow the application for the stay of further proceedings and execution and for payment into Court of the damages.

I however order that Counsel for the plaintiff shall undertake to repay the defendant of this action costs so far in the event of the defendant succeeding on appeal.

R.P. Mbalame
JUDGE

MR. HANJAHANJA: I pray for stay execution further proceedings in this matter pending appeal. The money should be paid into Court pending appeal.

MR. SAIDI: I object to the application. There is no evidence in this Court to prove that plaintiff is man of straw.

By Malawian standard K600 per month is not unreasonable.

Wife also works. She even got a car loan. I object to payment of damages into Court.

COSTS

I am willing to undertake to repay costs in the event of a successful appeal by defendant.

O R D E R

Stay of execution of the judgment would, in the circumstances, mean denying the plaintiff of the fruits of his litigation. Delaying execution would in the circumstances again mean justice denied. I disallow the application for the stay of further proceedings and execution and for payment into Court of the damages.

I however order that Counsel for the plaintiff shall undertake to repay the defendant of this action costs so far in the event of the defendant succeeding on appeal.

R.P. Mbalame
JUDGE