10 Apr 1992

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HIGH COURT OF MALAWI
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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.1215 OF 1990

BETWEEN:

J.E. CHINTHULI .... PLAINTIFF

AND

SMALL ENTERPRISE DEVELOPMENT
ORGANISATION OF MALAWI .... IST DEFENDANT

SACRANIE, GOW AND COMPANY .... 2ND DEFENDANT

CORAM: UNYOLO, J.
Chikopa/Kapanda, Counsel for the Plaintiff
Tembenu, Counsel for the Defendant
Kalimbuka Gama, Official Interpreter
Phiri, Senior Court Reporter

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JUDGMENT

In this matter the plaintiff claims damages from the defendant for loss of use of goods and for defamation.

The case arises in this way. The plaintiff stood as a guarantor of a loan given by the first defendant to one Regina Buledi. Three advances were given in the total sum of K3,500. It is not clear what kind of business the loanee engaged herself in. I mention business because the first defendant gives loans for business purposes only; to small scale entrepreneurs as a matter of fact. Whatever the loanee's business was, she failed to repay the loan. It appears she did not pay even one tambala. The first defendant then instructed the second defendant, a well-known firm of legal practitioners, to bring a suit against the loanee in order to recover the money due. A writ of summons was issued by the second defendant. The matter was registered as High Court Civil Cause No.28 of 1988. It appears that the loanee did not contest the proceedings and consequently judgment was entered for the amount claimed and costs. Even then the loanee did not come up to pay the money. The second defendant then proceeded to issue a writ of execution.

Something else happened. The first defendant also instructed the second defendant to sue the plaintiff in his capacity as guarantor of the loan. Dutifully the second defendant issued a writ of summons against the plaintiff.

Civil Cause No.574 of 1988 refers. The plaintiff served a defence to the action;. pleadings were closed and a summons for directions was taken out.

Reverting to Civil Cause No.28 of 1988 between the first defendant and the loanee, the Sheriff passed on the warrant of execution already mentioned to his Assistant at Trust Auctioneers for attention. The evidence shows that the loanee's address was shown on the said warrant as c/o Mr. J.E. Chinthuli (the plaintiff, that is), P.O. Box 600, Blantyre. A sheriff's officer, DW1, visited Mkwapatila village on 20th June, 1988 to execute the warrant. It appears that this is the village the plaintiff resides. The sheriff's officer was told that the loanee was not known in that village or area. The officer therefore returned empty-handed and in due course he sent a formal report to the Sheriff regarding his futile visit to the village and by copy of the report he requested the second defendant to make available to him someone who would be able to take him to the loanee's place.

This now brings us to a very interesting development. In response to the sheriff's officer's report the first defendant's office sent a note to say that the loanee was actually no other than the plaintiff's wife and that she would therefore be found at the plaintiff's residence. I must however mention here before I proceed that the Loan Guarantee forms were in the name of "Miss Regina Buledi". On the other hand the name endorsed on the warrant of execution was simply "Regina Buledi". The sheriff's officer decided to action the matter again. That was on 30th August, 1990. He telephoned the first defendant's office for transport (he had none of his own) and the first defendant obligingly made available to the sheriff's officer a pick-up and further made available one of its officers, DW.3, to accompany the sheriff's officer to the village. Two other sheriff's officers, DW2 one of them, accompanied the two to the village. They went to the plaintiff's house. I feel compelled to say that DW1, who led the team, was a most unreliable witness. He was contradicted in several material particular by his colleague, DW2, and also by DW3, the man from the first defendant's office. Initially I thought that DW1 had only forgotten what precisely transpired when they got to the plaintiff's house but it later became clear that he simply meant to tell the Court untruths.

The true evidence in my assessment boils down to this. The sheriff's officers (and DW3) found only PW1, the plaintiff's son, at the house. The plaintiff had gone to work at Agrikem in Blantyre and his wife, Mrs. Grace Chinthuli, nee Feyatoni, had gone to the market at Chadzunda. The sheriff's officers introduced themselves to the boy and told him what they had come for. They then proceeded to open the house and seized therefrom a sofa set, a radiogramme, a tilley lamp, a dining table, two chairs and two stools. Observably DW3 took an active part in the seizure and removal of these items. Thereafter the sheriff's officers left and brought the seized

items to their warehouse where they would in course of time sell the same if the loanee did not turn up to pay the amount due. No sooner had the Sheriff's Officers left than PW1 telephoned the plaintiff and told him what had happened. The plaintiff contacted the High Court where he learnt that the goods had been seized in execution of the warrant issued against the loanee in Civil Cause No.28 of 1988 above-mentioned and not in respect of his own case which as I have already indicated was still pending for trial, the plaintiff having put in a defence.

The plaintiff promptly went to see the sheriff's officers and laid claim to the seized items. The claim was not challenged and eventually, some 48 days later, all the items were returned to the plaintiff. Such are the facts in relation to the plaintiff's first head of claim, viz. the claim for damages for loss of use of goods. It is the loss of use of the said items of furniture and fridge and tilley lamp which forms the subject matter of this head of claim. I think that it is only right and proper that I finish with this claim straight-away here while the facts are still fresh in my mind.

The plaintiff's case on his pleadings on this aspect sounds in the tort of negligence. He pleads that since he was not a party to the suit in respect of which the warrant of execution was issued the seizure of his goods herein was wrongful. He contends that the incident would not have occurred but for negligence on the part of the defendants. The particulars of the alleged negligence are set out in the plaintiff's statement of claim, as follows:

"(a) Failing to take heed that there were two separate causes of action.

(b) Failing to take heed of the fact that the plaintiff was not a party to Civil Cause No.28 of 1988.

(c) Failing to separate the two causes of action.

(d) Seizing and removing the plaintiff's goods which the first defendant, its servants and/or agents knew or ought to have known belonged to the plaintiff.

(e) Causing the plaintiff's goods to be seized and removed from his house on the authority of a warrant of execution in Civil Cause No.28 of 1988 when the first defendant and the second defendant knew or ought to have known that the plaintiff was not a party to Civil Cause No.28 of 1988 but Civil Cause No.574 of 1988 and that the latter case was pending."

There can be no doubt in my judgment that in executing a warrant of execution a sheriff's officer must act strictly in accordance with the terms of the warrant. If a warrant is, for example, directed against A the sheriff's officer must go for the goods of A. He has no power to go for B's or somebody else's goods not being a party to the cause. As earlier indicated the plaintiff was not a party to the action in respect of which the warrant of execution was issued in the present case. The warrant itself clearly indicated who the execution debtor was, namely Regina Buledi. The sheriff's officers were therefore expected to go for the goods of this lady and were under a duty to ensure that they did not act to the contrary. This explains why the sheriff officers requested for someone from the first defendant's organisation to assist in taking them to the loanee's place of residence. On this topic the learned authors of Clerk & Lindsell on Torts, 5th Edition, observe at page 945, paragraph 1812 as follows:

> "The sheriff or other officer is, in the first place, bound to make inquiry as to the presence of the debtor or his property....."

And Watson v. Murray & Co. (1955) 2 QB 1 is for the proposition that the sheriff or other officer charged with the execution of the process of the court has a duty not only towards the party at whose instance the process issues but also towards the party against whom it is issued and that such sheriff or other officer will be liable for any act not covered by the authority of the process and which by itself is a trespass or conversion.

Reverting to the present case I have indicated that the first defendant's office did advise the sheriff's officers that the loanee was actually the plaintiff's wife thereby saying in other words that the loanee would be found at the plaintiff's house. Indeed, as I have already shown DW3, from the first defendant's organisation, actually accompanied and directed the sheriff's officers to the plaintiff's house. This is precisely how the first defendant comes in the noose.

The first defendant's case is that it was the plaintiff who led it to believe the loanee was his wife. She used the plaintiff's name and address in documents and/or letters relating to the loan. The first defendant produced a letter, Exhibit D2, which it wrote to the plaintiff and in that letter the loanee was referred to as the plaintiff's wife. It was conceded by the plaintiff that he did not write back disputing the loanee was not his wife. It was contended on the part of the first defendant that on these facts the plaintiff cannot be heard to complain about the seizure of the goods in this matter. I must say that the argument appears attractive but I regret I am unable to accept it for the following reasons: First, I have already said that the sheriff's officers and those accompanying had a duty to ensure that they did not seize

goods belonging to a stranger, who was not a party to the action in respect of which the warrant of execution was issued. Pointedly, the sheriff's officers had no right to seize the plaintiff's goods, even assuming that the loanee was his wife, unless the plaintiff had been joined in that action as a party. Such was not the case here, as I have already shown. It is also to be observed that neither the plaintiff nor the loanee was present when the sheriff's officers called at the house. Only the young man, PW1, was home and the evidence shows that the young man was actually overwhelmed by surprise and fear at the time. Indeed he was not asked whether the goods belonged to the loanee. According to him the party said they had come to seize the plaintiff's goods. It also appears to me that considering the nature of the goods seized the first defendant cannot be heard to say that these possibly could have been the loanee's goods. No wonder the goods were eventually returned to the plaintiff without contest.

To make a long story short there was in this case a clear trespass on the goods of the plaintiff. Perhaps I should mention here that to my mind the most appropriate cause of action on the available facts is trespass to goods. But I think that all in all the facts also disclose negligence. I have no problem with regard to the first defendant. As I have already pointed out, their servant, DW3, accompanied and directed the sheriff's officers to the plaintiff's house. It was also the firm evidence of PW1 that DW3 took a very active part in the seizure of the goods. It appears that he actually supervised the operation. Clearly he did all that in the course of his employment. Accordingly the first defendant must be liable on this cause of action, and I so find.

I now turn to the case against the second defendant. Mr. Chikopa contended that the second defendant must also be liable because as the first defendant's legal practitioners the second defendant conducted the case on behalf of their clients, the first defendant, and had a duty to ensure that a more responsible person other than DW3 accompanied the sheriff's officers to the plaintiff's house. With respect I am unable to assent to this argument. The sheriff's officers simply requested for someone to take them to the place where the loanee would be found. The second defendant passed this request on to the first defendant. That, in my view, was all they were called upon to do. I refuse to believe that the second defendant was further required to choose who should go. Indeed it appears that DW3 was the most appropriate person to go. He was the Loans Officer. For these reasons the second defendant cannot in my view be faulted. I therefore dismiss the plaintiff's claim against the second defendant on this point.

Finally I turn to the plaintiff's claim for defamation. The plaintiff's case on this aspect is set out under paragraph 8 of his statement of claim, as follows:

> "Further or in the alternative, due to negligence on the part of the defendants, their servants and/or agents, the wife of the Under Sheriff, a Mr. Mlanga, the one who went to execute the warrant of execution on the plaintiff's goods falsely and maliciously published or caused to be published of and concerning the plaintiff and of him, at a bus stage at Lower Sclater Road, in the City of Blantyre, the words following, that is to say: 'mwaonatu anthu onyada inu akulandani katundu mukungosamalika pachabe".

It was pleaded that the said words were published to the general public waiting for a bus going to Mpemba (this is the area the plaintiff lives) and that they meant the goods did not belong to the plaintiff and that he was impecunious.

The plaintiff called his daughter, PW3, to support his case on this point. The witness told the Court that on the material day she went to the bus stands in Blantyre in order to catch a bus to her home. She was working in Town but staying with her father at Mpemba. She said that she found Mrs. Mlanga there. It was her evidence that she knew Mrs. Mlanga because she too came from Mpemba. It is, I think, useful to reproduce the witness's evidence, she said:

> "She (referring to Mrs. Mlanga) pointed to me. I don't know what she said. When I arrived she began to talk and they looked at me and they laughed. So I was wondering what was amiss. Then she said "who do you think you are in Town". I think by this she meant all of us belonging to the Chinthuli family."

I should point out that the witness gave her evidence in English. When asked whether Mrs. Mlanga said all this in English the witness stated that Mrs. Mlanga spoke in Chichewa. She added:

> "and she (Mrs. Mlanga) said our father being a retired officer from the Government does not have money to spend and we would eat with the dogs and this would show us what it is to live in town."

It will be seen from the foregoing that there is some variation between the words pleaded by the plaintiff and the words used by PW3 in her evidence. Observably, though a plaintiff must allege the precise words in his statement of claim it is no longer necessary now, as it used to be in the

past, for him to prove that those precise words were in fact published. It suffices if the plaintiff proves words which were substantially to the same effect. See Hairman v. Wessels (1949) 1 SALR 431 cited in Gatley on Libel and Slander, 5th Edition, page 542. In Tournier v. National Provincial Bank (1924) 1 KB 469, Atkin L.J. at pages 487, 488 put it this way:

> "The plaintiff is entitled to put before the jury his case that the words proved, though not the very words pleaded, are words substantially to the like effect... No slander of any complexity could ever be proved if the ipsissima verba of the pleading had to be established."

Scrutton L.J. (ibid) at page 478 put it thus:

> "The jury should be directed that if they think the defendant used, in substance, the words, or a material and defamatory part of the words complained of, they should say so and he is liable."

This, I think, is sound law. But I think I should add and say that the position is different where there is material variance between the words in the oral evidence and those pleaded in the statement of claim. In such a situation the variance will be fatal to the plaintiff's case. See Gatley, page 542, para 995.

Referring to the present case I understand that the literal translation of the words "mwaonatu anthu onyada inu akulandani katundu mukungosamalika" is "There you are you proud people they have taken away your goods and you are just proud for nothing." It will however be noted that nowhere did PW3 in her evidence state that Mrs. Mlanga said anything about the plaintiff's goods having been seized or make any reference to the plaintiff's goods. I have given the matter most serious consideration but I regret I am unable to say that what comes out from the oral evidence (PW3's evidence) is substantially the same as the plaintiff's case on his pleadings. In my judgment PW3's evidence discloses new matters which the defendants were not aware of before the trial. The plaintiff's case must therefore fail on this ground. Indeed I would go further. Even if I accepted that PW3's evidence was substantially to the same effect as the words used in the statement of claim, I would find that it was not proved Mrs. Mlanga was an agent or servant of the defendants or either of them so as to hold the defendants responsible for what she said. In short the plaintiff's action in defamation must fail and it is dismissed.

To recapitulate, I have found the first defendant liable for the wrongful seizure of the goods. I have found the second not liable under this head of claim. Finally I have found both defendants not liable on the claim for defamation.

I now turn to damages. The uncontroverted evidence on this point shows that the plaintiff was deprived of the use and enjoyment of the goods for a period of 48 days. That was a long period and there can be no doubt about the inconvenience he was put to during that period as he stayed without his furniture and the other items. These are matters which a court can take into account in assessing appropriate compensation. See Fell v. Whittaker (1871) LR7 QB 120. Further there can be no doubt about the humiliation suffered by the plaintiff and the injury caused to his credit as a result of the wrongful seizure of the goods. Again this is a relevant matter to be taken into account in assessing damages. See Owen & Smith v Reo Motors (Britain) Ltd. (1934) L.T. 274. It also appears to me that the goods were seized in an insolent and overbearing manner. As if this was not enough the first defendant caused the goods to be held for unduly long yet the plaintiff had laid his legitimate claim thereto immediately. I also take account of the fact that some of the goods were not in the same condition on their return as they were at the time they were seized. Having regard to all these matters and doing the best I can, I assess the damages against the first defendant in the sum of K2,500.00. I therefore enter judgment for the plaintiff for this sum under this head of claim, with costs.

The defendants will have costs on those claims they have succeeded.

PRONOUNCED in open Court this 10th day of April, 1992 at Blantyre.

L.E. Unyolo
JUDGE