JUDICIARY

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NUMBER 2306 OF 2004

BETWEEN:

CATHERINE JAMES KACHALE……PLAINTIFF

-AND –

ALISA ASHANI ……..……1ST DEFENDANT

ANNE ASHANI……...……2ND DEFENDANT

CORAM: THE HONOURABLE JUSTICE E. B. TWEA
Mr Masuku, of Counsel for the plaintiff
Mr Hara, of Counsel for the defendant
M. Manda – Official Interpreter

R U L I N G

Twea, J

This is an appeal against the ruling by the Assistant Registrar as taxing master.

I must point out that, in the ordinary sense, this matter should have been

dealt with by way of review under order 62 rules 33 and 35 of the Rules of the Supreme Court and not by way of appeal.

It is on record that the parties had filed summons for rehearing or review before another assistant Registrar who decline to hear the review because he is closely connect to one of the parties. There is no explanation why the matter was not heard before the officer who taxed the bill. Order 62 rule 33/1 provides:

> "Any party to any taxation proceedings who is dissatisfied with any decision of a taxing office (other than a decision on a provisional taxation or a decision under rule 28) may apply to the taxing officer to review his decision".

Such application must be made within 21 days or within such other period as may be fixed by the taxing officer.

The procedure for such review is provided for in the Rules. It is sufficient to mention that the objections to the taxation must be clearly spelt out to which the other parties must answer.

It is provided in Order 62 rule 35(1) that:

> "Any party who is dissatisfying with the decision of a taxing officer on a review under rule 33 may apply to a judge for an order to review that decision either in whole or in part, provided that one of the parties to the taxation proceedings has requested that officer to state the reasons for his decision on accordance with rule 34(4)".

Such an application may be made anytime within 14 days of issuance of the certificate under rule 34(4). The application would be by summons. On review no new evidence may be received unless the court directs otherwise. The judge on review may exercise all such powers as are vested in the taxing officer: Order 62 rule 35/4.

I allowed this appeal notwithstanding the procedural issues. I do not think any of the parties was prejudiced. I allowed both parties to give evidence.

I have examined the judgment of my brother, Justice Manyungwa, and I find

that it is clear that he gave judgment to the plaintiff for damages in:

- trespass at market rental value.

reimbursement of land rent paid to the Government for the period the defendant were in occupation.

- actual damage to trees, buildings demolished and fittings removal from the house.

The plaintiff was also granted a permanent injunction.

In his ruling the Assistant Registrar, as taxing officer, meticulously followed the judges direction and awarded the plaintiff his costs as billed.

The appeal, in challenging the taxation, raised objections. However, there were no counter arguments as to the proper valuation for damage to trees, land rentals payable to the government or rentals of land at market value. The appellant only demanded prove of rentals paid to the Government. It is a legal requirement that leasees pay rentals to the Government or lessors. This has not been disputed. By necessary implication, on the appellants submission, it is clear that they did not, themselves, pay the rentals to the Government at the time they were in occupation. If they did not, it follows therefore, that the arrears will have to be paid by the respondent as the rightful owners.

Clearly, it would have been easier, for both parties, to obtain the rental values directly from the Government Ministry responsible for lands. Such valuation would have been sufficient evidence. However, the Assistant Registrar's finding cannot be faulted. In the same vein, I find that valuation of trees by a Government Department responsible for valuation such cannot be faulted. The legal presumption is that it was done legally unless the defendants can prove otherwise.

I therefore confirm the ruling of the Assistant Registrar in respect of the trees, rentals to the Government and damages for trespass.

The only issue that was contested hotly by the defendant was value of the property demolished.

It was argued following ***Dodd Properties (Kent) Vs Canterbury City***

Council [1980] 1 All E. R. 928 that the value in issue should be the value at the time of destruction. I agree that this is the fundamental principle. However, the case cited does suggest, as do other cases that the general principle in damages is that the innocent party must be placed, so far as money can, in the same position as he was before the breach. It was said by Megaw L. J. that:

> "The true rule is that, where there is a material difference between the cost or repairs at the date of the wrongful act and the cost of repair when the repairs can, having regard to all relevant circumstances, first reasonably be undertaken, it is the latter time by reference to which the cost of repair is to be taken in assessing damages. That rule conform with the broad and fundamental principle as to damages, as stated in Lord Blackburn speech in ***Livingstone Vs Rawyards Coal Co. (1880) 5 App Cas 25, 39 ,*** where he said that that measure of damage is:
>
> > 'that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had sustained the wrong for which is now getting compensator or reparation".

The question thus, becomes when was the wrongful act of demolishing the building done? This has not been determined. It is clear however, that the defendant had to be evicted by the sheriff before the plaintiff could be back to her land. Further, the plaintiff could not, there and then, establish the costs of damage caused. She required some experts to examine the land and ruins thereon, to determine how much it would cost.

Further, I note that the damage had not been repaired. The plaintiff was, and is, hoping to use the money to be obtained to rebuild the houses and sheds. In the case of ***Dodd*** (above) his Lordship agreed with the observations of Oliver J. in ***Radford V De Frobervilee [1977] 1W.L.R. 1262 @ 1268*** on the relationship between the duty to mitigate and the measure, or amount of damages and said:

> "A plaintiff who is under a duty to mitigate is not obliged, in order to reduce damages to do that which he cannot afford to do…" _

The plaintiff therefore, could not have been expected to know when the destruction was done or to have repaired or rebuilt the properties earlier.

Be this as it may, I have examined the evidence and I find that it is not disputed that the houses were built using direct labour and that it is admitted that there was no running water. The other things included in the exhibits by the plaintiff therefore were not applicable. I also noted that the plaintiff did not even have the basic knowledge of what her experts put in the documents. I find the evidence for the defendant cogent and neutral in what it would cost to rebuild. I therefore award the cost stated by the defendant at K5, 505,964.00.

I disallow the new evidence brought in by the plaintiff on lost farm inputs and harvest. This was not before the judge, the taxing officer or me until now by way of addendum.

The appeal succeeds to this extent. Costs for the appeal only, to the defendants.

Pronounced in Chambers this 23rd day of March 2009 at Blantyre.

E. B Twea
JUDGE