

**IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY**

**CIVIL CAUSE NO. 103 OF 2003**

**BETWEEN**

**K.O. MWANGUPIRI ..... APPELLANT**

**AND**

**MANICA (MALAWI) LIMITED..... 1<sup>st</sup> RESPONDENT**

**PIKE MPHAKA ..... 2<sup>ND</sup> RESPONDENT**

**CORAM** : **HON. JUSTICE MZIKAMANDA**  
: , Counsel for the Appellant  
: Mr. Dossi, Counsel for the Defendant  
: Mr. Gonaulinji – Court Interpreter

**JUDGMENT**

**MZIKAMANDA, J.**

The Plaintiff commenced the present action against the Defendants by way of a specially endorsed writ claiming the delivery of Mercedes Benz engine No. R 1020140003 which had been wrongfully detained by the first Defendant, damages for loss of use and K15,000.00 costs. The proceedings are contested.

According to the statement of claim, the Plaintiff was at all material times employed in the military service and was based at Salima Military Wing. The 1<sup>st</sup> Defendant is a forwarding and clearing agent and the 2<sup>nd</sup> Defendant is employed in the Malawi Police Service and was at the material time In-Charge of Malawi Police Peace keeping contingent in Kosovo.

By an agreement between the Plaintiff and the 2<sup>nd</sup> Defendant made sometime in 2002 in Kosovo while both were on duty, the 2<sup>nd</sup> Defendant agreed to ship to Malawi the Plaintiff's Mercedes Benz Engine No. R 1020140003 in a container carrying personal effects of other Police Officers. The container shipped to Malawi with the 1<sup>st</sup> Defendant as consignee for the account of Malawi Police.

Upon arrival in Malawi the Plaintiff discovered that all the personal effects belonging to the other police officers had been taken by the owners and that the 1<sup>st</sup> Defendant was keeping the engine as Security for the clearing charges.

The Plaintiff approached the 2<sup>nd</sup> Defendant and the parties entered into another agreement where the 2<sup>nd</sup> Defendant disclaimed the said engine and the Plaintiff then did all the clearing formalities on his own. On the 3<sup>rd</sup> of January, 2003 the Malawi Revenue Authority issued a Release Note for the 1<sup>st</sup> Defendant to release the engine to the Plaintiff. The 1<sup>st</sup> Defendant however refused to release the engine to the Plaintiff. He claimed delivery of the engine to the Plaintiff, damages for loss of use of the engine and costs of the action.

The statement of defence for the 1<sup>st</sup> Defendant shows that it admits that it did receive as a receiving agent the said container in which the said engine was contained as one of the shipped items. When the said container arrived in Malawi all the personal effects of 19 Police Officers were cleared with Malawi Revenue Authority by the Office of the Police Inspector General. The said engine which belonged to the Plaintiff, an officer of the Malawi Army was left uncleared and the 1<sup>st</sup> Defendant denies that it held the said engine as Security for clearing charges. When the Plaintiff went to the Offices of the 1<sup>st</sup> Defendant to claim the said engine the 1<sup>st</sup> Defendant's servant or agent advised the Plaintiff that the said engine was uncleared with Malawi Revenue Authority, so the 1<sup>st</sup> Defendant could not release it. The Plaintiff then cleared the engine with Malawi Revenue Authority and on 3<sup>rd</sup> January, 2003 obtained a customs Release Order.

The 1<sup>st</sup> Defendant nonetheless declined to release the said engine to the Plaintiff and advised him to ask the 2<sup>nd</sup> Defendant to come to the 1<sup>st</sup> Defendant's premises and take delivery of the said engine because under the shipping documents only the 2<sup>nd</sup> Defendant was entitled to claim the shipped goods. On 20<sup>th</sup> February, 2003 the 2<sup>nd</sup> Defendant took delivery of the said engine. The 1<sup>st</sup> Defendant denied that it was keeping the said engine as alleged or at all. There is no defence for the 2<sup>nd</sup> Defendant although he did file acknowledgement of service of Writ of Summons indicating that he intended to contest the proceedings.

The Plaintiff who was his only witness adopted his written statement. The statement shows that the Plaintiff is Lieutenant Colonel in the Malawi Defence Force at the material time based at Salima but now at Mvera Support Battalion. In

January, 2001 he was deployed to Kosovo as a Military Liaison Officer where he met Mr. Pike Mphaka then in-charge of the Malawi Police Peace Keeping Contingents. They used to visit each other. In May, 2002, Mr. Mphaka informed him that they would transport their properties to Malawi using a hired container to be paid by the United Nations. He then asked Mr. Mphaka if there would be space in that container for him to send his Mercedes Benz engine which he had bought. After checking the luggage of the 21 Police Officers he telephoned the Plaintiff telling him that he should meet Mrs. Ngauma at a Travel Agent's Office in Kosovo and leave the engine there. The following day he was told that the engine had been loaded in a container. He returned to Malawi in July, 2002 and he was told in December, 2002 that the goods had arrived for which he had to pay duty and also 100 US\$ as his contribution to the transportation. On 3<sup>rd</sup> January, 2003 he went to Zomba from where he travelled with Mr. Mphaka to Blantyre, Malawi Revenue Authority Offices.

At MRA Offices the Plaintiff discovered that there had been a notice of seizure in respect of the engine but such notice was in the name of Mr. Mphaka. He requested that the notice be in his name and this was done. He paid all dues to MRA and he was issued with a release note. He produced the Seizure Notice, the Release Note and a receipt for compilation of duty, all in his name.

From MRA Offices the Plaintiff and Mr. Mphaka were to go to the 1<sup>st</sup> Defendant to collect the engine, but Mr. Mphaka insisted that the Plaintiff escort him to Zomba where he was urgently required. He obliged and returned to Blantyre. The following morning he went to MANICA and met one Charles Katola to whom he

presented the documents for the release of the engine. Mr. Katola said MANICA would not release the engine because it was left as Security for a bill which had been left by Mr. Mphaka and his colleagues. That was when the Plaintiff returned to Lilongwe and sought legal assistance. According to him MANICA was not supposed to release the engine to Mr. Mphaka because all the clearance formalities were done by him and the release note was issued in his name. His claim is for delivery of the engine or the value thereof, damages for loss of use and costs of the action.

During cross-examination he said that he was very surprised that MANICA demanded money. Mr. Mphaka only asked him to contribute US\$100. He was never told that there was anything outstanding. At MRA Mr. Mphaka disclaimed the engine. Mr. Mphaka was the one in whose name goods were left with the shipper and shipping documents reflected his name. Mr. Mphaka became uncooperative and crafty. He did not know that Mr. Mphaka had pledged the engine with MANICA. He is aware that the engine was released to Mr. Mphaka. All items in the container were in the names of 18 other Police Officers. Mr. Mphaka sold the engine to one sergeant Kachingwe.

The only defence witness adopted his statement. That statement shows he, Mr. Anthony Chawinga, is Imports Manager for the 1<sup>st</sup> Defendant. Towards the end of the year, 2002 the 1<sup>st</sup> Defendant received a shipment of one container said to contain 190 pieces of personal effects sent to the 1<sup>st</sup> Defendant as consignee/clearing and forwarding agent for the account of the Malawi Police. The bill of lading showed that once shipper was UNMIK HQ, Pristina Serbia and

the Consignee as Manica Malawi. The customs declaration was made by the 2<sup>nd</sup> Defendant who was the Contingent Commander of the Malawi Police Contingent attached to UNMIK in Kosovo.

All the personal effects of the 19 Police Officers were cleared with Malawi Revenue Authority (MRA) by the Office of the Inspector General of Police except a Mercedes Benz engine. The 2<sup>nd</sup> defendant is the one who collected from the 1<sup>st</sup> Defendant the Personal effects of the 19 police officers after he had presented the bill of lading in respect of the goods.

After that the 2<sup>nd</sup> Defendant came again to the 1<sup>st</sup> Defendant to claim the engine. The 1<sup>st</sup> Defendant informed him that the engine was not cleared with MRA and that therefore the 1<sup>st</sup> Defendant could not release it.

It transpired that the Plaintiff, not the 2<sup>nd</sup> Defendant, went to MRA and cleared the engine and was issued with Customs Release Order. However, when he presented the Release Order to the 1<sup>st</sup> Defendant and sought delivery of the engine, the 1<sup>st</sup> Defendant refused to release the engine to him on the ground that the shipping documents including the bill of lading were not in his name and that the 1<sup>st</sup> Defendant could only release the engine to a person who was in possession of shipping documents. The 1<sup>st</sup> Defendant advised the Plaintiff to ask the 2<sup>nd</sup> Defendant to come and claim the engine because under the shipping documents it was the 2<sup>nd</sup> Defendant who was entitled to claim delivery of the shipped goods, including the engine.

On 20<sup>th</sup> February, 2003, the 2<sup>nd</sup> Defendant called at the 1<sup>st</sup> Defendant and collected the engine. The 2<sup>nd</sup> Defendant wrote a note acknowledging having collected the engine. Then the 1<sup>st</sup> Defendant received a demand letter dated 16<sup>th</sup> January, 2003 from the Plaintiff's Legal Practitioners demanding that the 1<sup>st</sup> Defendant do release the engine to the Plaintiff. The Defendant replied to the Plaintiff's Legal Practitioner's letter by its letter dated 27<sup>th</sup> January, 2007 in effect denying liability to release the engine to the Plaintiff.

What the witness said *viva voce* was a repeat of what he said in the statement he adopted. During cross-examination he said that the 1<sup>st</sup> Defendant did not try to enquire why Mr. Mphaka took a long time to collect the engine. He said that the demand letter of 16<sup>th</sup> January, 2003 was after the release of the engine although the engine was released on 20<sup>th</sup> February, 2003. At time of the release they did not know that there was an issue involving the engine. It was not possible for ownership in their warehouse to be transferred to another. There are some shipments which do not require a bill of lading. It is possible for a consignee to use an agent to collect goods. When the Plaintiff approached 1<sup>st</sup> Defendant he was advised to bring the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant did not try to find out why Plaintiff cleared the engine. The engine was released upon Mr. D. Albert's instruction. On the day of release Mr. Mphaka sorted out the bill he owed 1<sup>st</sup> Defendant but if the bill is not sorted out it depended on what they agreed. The engine was kept as *lien* but it was also not cleared. All the pieces the Police brought were duty free. Mr. Mphaka had told them that he was going to do the declaration of the engine later. The engine was not a personal effect and they did not know who the owner was. He knew that the engine was seized by Customs

and it overstayed without being cleared. Mr. Mphaka had told 1<sup>st</sup> Defendant that the engine belonged to the Plaintiff at the time he saw that the engine was being seized by Customs. He however said that by telling them that the engine belonged to the Plaintiff, the 2<sup>nd</sup> Defendant was not disclaiming the engine. He confirmed that at that point the 1<sup>st</sup> Defendant had knowledge that the engine belonged to the Plaintiff. Nonetheless they needed a bill of lading to release it. The Release Order does not name Mr. Pike Mphaka as the one to whom the engine be released. 1<sup>st</sup> Defendant preferred to release to one with bill of lading. Mr. D. Albert was General Manager of MANICA at the time and the matter was referred to him when they saw that it was hot. He said that he never dealt with the Plaintiff personally but the information was only passed to him. He also confirmed that there was a time when Mr. Mphaka went to 1<sup>st</sup> Defendant on his own and demanded the engine and he was refused. He said declaring of goods to Customs has to do with ownership but release did not have to do with ownership. The bill of lading in question did not indicate an engine. The shipment was treated as a writ. A Release Order mandates an agent holding the goods to release to the person who has cleared the goods but above all if it is a container bill of lading has to be surrendered or the one who handed over the bill of lading is entitled.

The present matter being a civil matter the duty placed on the Plaintiff is to prove the claim on a balance of probabilities.

The parties to this case agree that this is a case of bailment. It is conceded that a Mercedes Benz engine. No. R 1020140003 was shipped in one container from



Kosovo to Malawi together with personal effects of 19 Police Officers who had been on a UN Peace Keeping Mission to Kosovo. The Shipper was United Nations Mission in Kosovo, Malawi Police contingent and the consignee was Manica Malawi. There is unchallenged evidence that the engine was bought in Kosovo by the Plaintiff for himself. There is also unchallenged evidence that the Plaintiff arranged with the 2<sup>nd</sup> Defendant, who was the Commandant for the Malawi Police Contingent in Kosovo, that the engine be included in the container of Police Contingent personal effects and be transported to Malawi again for the Plaintiff's benefit. There is also uncontroverted evidence that when the container arrived in Malawi the Malawi Police cleared only the Personal effects of the 19 police officers leaving out the Plaintiff's engine.

It is admitted that Malawi Revenue Authority placed a notice of seizure against the engine and the notice was originally in the name of the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant admits that the 2<sup>nd</sup> Defendant told them that the engine did not belong to him, but it belonged to the Plaintiff. Indeed the notice of seizure was changed by Malawi Revenue Authority from the name of the 2<sup>nd</sup> Defendant to that of the Plaintiff at the instance of both the 2<sup>nd</sup> Defendant and the Plaintiff. The 1<sup>st</sup> Defendant concede that the 2<sup>nd</sup> Defendant told them that the owner of the engine was the Plaintiff, well before they released the engine to the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant was well aware that it was the Plaintiff who subsequently cleared the engine with Malawi Revenue Authority and that Malawi Revenue Authority issued a Customs Release Note in respect of the engine in the name of the Plaintiff. This the 1<sup>st</sup> Defendant became aware of well before they released the

engine to the 2<sup>nd</sup> Defendant. It is admitted by the 1<sup>st</sup> Defendant that twice they refused to release the engine to the Plaintiff when he approached them.

According to the 1<sup>st</sup> Defendant's own defence statement in paragraph 4 (c ) they pleaded that:

*“When the Plaintiff came to the 1<sup>st</sup> Defendant's Offices to claim the said engine the 1<sup>st</sup> Defendant's servant or agent advised the Plaintiff that the said engine was uncleared with Malawi Revenue Authority, so the 1<sup>st</sup> Defendant could not release it.”*

It is clear from the 1<sup>st</sup> Defendant's defence that the first reason 1<sup>st</sup> Defendants gave why the engine would not be released to the Plaintiff was that it had not been cleared with Malawi Revenue Authority. When the Plaintiff cleared the engine with Malawi Revenue Authority where he obtained a release order and returned to the 1<sup>st</sup> Defendant to have the engine released to him they gave him yet another reason why they could not release it. That reason is in Paragraph 5 (a) of the 1<sup>st</sup> Defendant's defence and it is that:

*“the 1<sup>st</sup> Defendants declined to release the said engine to the Plaintiff and advised him to ask the 2<sup>nd</sup> Defendant to come to the 1<sup>st</sup> Defendant's premises and take delivery of the said engine because under the shipping document only the 2<sup>nd</sup> Defendant was entitled to claim the shipped goods.”*

The shipping document the 1<sup>st</sup> Defendants referred to was the bill of lading which they said was in the name of the 2<sup>nd</sup> Defendant. It is to be observed that at this point in time the 2<sup>nd</sup> Defendant had already told the 1<sup>st</sup> Defendants in the Presence of the Plaintiff that the engine in fact belonged to the Plaintiff although the bill of lading may have had the name of the 2<sup>nd</sup> Defendant. As a matter of fact the bill of lading was not in the name of the 2<sup>nd</sup> Defendant. It was in the name of UNMIK Civil Malawi Police (See Exhibit A C 6 of the defendants). This was also despite the fact that all documents from Malawi Revenue Authority which the Plaintiff showed the 1<sup>st</sup> Defendants were in the name of the Plaintiff, that is to say notice of seizure, Release Note and Receipt from Malawi Revenue Authority in payment of the clearing charges.

Now delivery of goods or personal property by a bailor to a bailee, in trust for the execution of a special object upon or in relation to such goods, beneficial either to the bailor or bailee or both, and upon a contract, express or implied to perform the trust or carry out such trust, and there upon either re-deliver the goods to the bailor or otherwise dispose of the same in conformity with the purpose of the trust is what is called bailment. (See Blacks Law Dictionary Centenal edn 1891 - 1991). In short bailment is an agreement whereby possession of personal property is surrendered by the owner with provision for its return at a later time. The three distinct requirements for bailment are (1) retention of title by the bailor (2) possession and temporary control of the property by the bailee and (3) ultimate possession to revert to the bailor or someone designated by the bailor. A bailor/bailee relationship therefore can be for the benefit of a third party designated by the bailor. In the present case the 2<sup>nd</sup> Defendant can properly be

described as the bailor in all the circumstances while the 1<sup>st</sup> Defendant was the bailee of the engine. A bailee has a duty to exercise due care in respect of the property bailed. The amount of care demanded of a bailee varies with nature and value of the article bailed. A contract for the carriage of goods constitutes a mutual benefit bailment, but the care required of the carrier greatly exceeds that of the ordinary bailee. ( See Principles of Business Law 13 edn Robert N. Corley, Peter J. Shedd, and Eric M. Holmes 1986 P. 465).

That a third party may lay claim to property in the possession of the bailee was recognized in the cases of Henderson & Co. v Williams {1895} 1 QB 521, Ramson v Platt {1911} 2 KB and Wilson v Anderson {1830} 1 B & Ad 450. I am of the view that it is good law to say that if a bailee stands on the bailor's title and refuses a third party's demand without the bailee having interpleaded, that would amount to wrongful detention against the third party who has a better title. The bailee would in those circumstances be liable if it turns out that the third party has a better title to the property.

In the present case the 1<sup>st</sup> Defendant has insisted that they could not release the engine to the Plaintiff who was clearly the general owner in preference of the 2<sup>nd</sup> Defendant who was clearly, special owner, an owner only for the purposes of shipment. They have based their insistence on the argument that the bill of lading in respect of the engine was in the name of the 2<sup>nd</sup> Defendant and not the Plaintiff. This insistence is surprising in that the 2<sup>nd</sup> Defendant personally informed 1<sup>st</sup> Defendant that the owner of the engine, was the Plaintiff at the time both him and the Plaintiff visited the offices of the 1<sup>st</sup> Defendant. In addition, the 1<sup>st</sup>

Defendant were shown all Customs clearing documents including a release note in the name of the Plaintiff. Now a bill of lading is a document evidencing receipt of goods for shipment. According to Blacks Law Dictionary, a bill of lading is a:

*“Document evidencing receipt of goods for shipment issued by a person engaged in business of transporting or forwarding goods and it includes airbill.... An instrument in writing, signed by a carrier or his agent, describing the freight so as to identify it, stating the name of the consignor, the terms of the contract for carriage, and agreeing or directing that the freight be delivered to the order or assigns of a specified person at a specified place. It is receipt for goods, contract for their carriage and is documentary evidence of title to goods.”*

A document of title is a document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers. It may be issued by a bailee or directed to a bailee and it covers goods in the bailee's possession. It may be negotiable or nonnegotiable. Thus a bill of lading may be negotiable or nonnegotiable. Whether a bill of lading is negotiable or nonnegotiable it can be transferred although their methods of transfer may differ. The bill of lading in the present case is marked *“BL not negotiable unless consigned to order.”*

The Transferring of a document of title goes with the shifting of rights from the transferer to the transferee. In the case at hand when the 2<sup>nd</sup> Defendant informed

the 1<sup>st</sup> Defendant in the presence of the Plaintiff that the engine which the 1<sup>st</sup> Defendant was holding belonged to the Plaintiff contrary to what the bill of lading said, that in my view constituted sufficient notice to the 1<sup>st</sup> Defendant that title in the engine in fact rested in the Plaintiff. This was further confirmed by the Plaintiff himself when he laid claim to it and produced custom clearing documents supporting his claim to title to the engine. At that point the 1<sup>st</sup> Defendant must have realized that there was a third party claim to the engine which was supported by the bailor himself. Indeed in Paragraph 3 (c ) of the 1<sup>st</sup> Defendant's defence it is stated that:

*“The defendant pleads that the said engine, which belonged to the Plaintiff, who was an Officer of the Malawi Army was left uncleared, the 1<sup>st</sup> Defendant denies that it held the said engine as security for clearing.”*

Clearly the 1<sup>st</sup> Defendant knew that title in the engine vested in the Plaintiff even before it released it to the 2<sup>nd</sup> Defendant.

The 1<sup>st</sup> Defendant's evidence shows that they refused to release the engine to the Plaintiff first because it had not been cleared and second because the bill of lading was in the 2<sup>nd</sup> Defendant's name. Yet when the Plaintiff cleared the engine and when 2<sup>nd</sup> Defendant told 1<sup>st</sup> Defendant that title to the engine in fact rested with the Plaintiff the 1<sup>st</sup> Defendant still refused to release the engine to the Plaintiff. I hold that that refusal was wrongful.

Again the 1<sup>st</sup> Defendant's evidence shows that released could only be where there had been customs clearance and bill of lading. It shows that both were required as they could not release when one of the conditions was not fulfilled. Yet they released the engine to 2<sup>nd</sup> Defendant when he only fulfilled one condition of bill of lading, although as I have already observed 2<sup>nd</sup> Defendant verbally transferred whatever title the bill of lading evidenced to the Plaintiff, who by all accounts had a better title than the 2<sup>nd</sup> Defendant. Indeed the 1<sup>st</sup> Defendant was well aware of the dual claim of title to the engine and that is why they described as a "*hot matter to be referred to management.*" Then the engine was released to 2<sup>nd</sup> Defendant, not on the basis of satisfying the two conditions 1<sup>st</sup> Defendant had set but merely "*upon Mr. D. Albert's instructions on 20/02/2003.*" This was wrongful release of the engine.

It is interesting that the 1<sup>st</sup> Defendant contradict themselves on the reasons for refusal to release the engine to the Plaintiff whom they knew was the rightful owner and had better title than 2<sup>nd</sup> Defendant. In paragraph 3 (c ) of the 1<sup>st</sup> Defendant's defence statement it is stated that:

*"... the 1<sup>st</sup> Defendant denies that they held the said engine as security for clearing charges."*

Yet in their letter to the Plaintiff's lawyers dated 27<sup>th</sup> January, 2003 they gave as one of the reasons for rejecting the Plaintiff's claim that:

*“Secondly the following amount is still outstanding in our book as Malawi Police is treated as a COD (Cash on Delivery client.....  
We therefore reject this claim for reasons listed above.”*

The inconsistency continued in the defence evidence when they said that by the time they released the engine to the 2<sup>nd</sup> Defendant on 20<sup>th</sup> February, 2003 they were unaware of the claim by the Plaintiff for the same engine. This is contrary to what is clearly a rejection of the claim in their letter of 27<sup>th</sup> January, 2003. This was yet another attempt to escape liability on the part of 1<sup>st</sup> Defendants for their having wrongfully released the engine to 2<sup>nd</sup> Defendant when they clearly knew that the Plaintiff had the better title to the engine. I hold that 1<sup>st</sup> Defendant liable for wrongfully refusing to release the engine to the Plaintiff and for wrongfully releasing it to the 2<sup>nd</sup> Defendant.

There is overwhelming and unchallenged evidence against the 2<sup>nd</sup> Defendant for wrongfully taking the Plaintiff’s engine and converting it by selling it without the authority of the Plaintiff. I find that the Plaintiff has proved his claim against both 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendant on a balance of probabilities.

The letter that the 2<sup>nd</sup> Defendant wrote to the 1<sup>st</sup> Defendant on 20-02-2003 Exhibit AC10 does not absorb the 1<sup>st</sup> Defendant of liability. It is interesting that the letter was written the way it was. It clearly creates an impression that both the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant were anticipating continued claim by the Plaintiff as the 1<sup>st</sup> Defendant had already noted that the matters was “hot”. The letter reads in part that:



“Dear Sir,

The engine that was held by Manica has now been collected by me. I therefore, take full responsibility as to any claim that may be made by any person.

With this, I therefore, take full responsibility for any legal action or otherwise as a result of the release of the engine and hereby indemnify Manica Malawi for any claim, Civil or otherwise legal action.

Respectfully

Pike Mphaka

(Signed)”

It would appear that the 1<sup>st</sup> Defendant demanded this letter. The necessity of it is unclear when it was the managing director who gave instructions for the release of the engine. It is clear both defendants were aware that they had engaged themselves in wrongful conduct against the Plaintiff which would have legal consequences. Ex AC 10 therefore is of no consequence and has no effect on the Plaintiff’s claim against the 1<sup>st</sup> Defendants in all the circumstances.

I must now turn to damages. I fully agree and subscribe to the sentiments of Lord Denning MR in *Building and Civil Engineering Holiday Scheme Management Ltd v Post Office* [1965] 1 ALL ER 163 at 168 when he said:

*“At Common Law in the case of bailment, the general principle is that of **restitutio in integrum**, which means that the party damnified is entitled to such a sum of money as will put him in as good position as if the goods had not been lost or damaged. This is subject however to the qualification that the damages must not be too remote, that is, they must be such damages as flow directly and in the usual course of things from the loss or damage.”*

Unyolo, J. as he then was, put it clearly in Chiwaya v Sedom [1991] 14 MLR 47 at 55 in the following terms:

*“Next I turn to the claim for damages for trespass to goods. Observably, the Plaintiff pleaded conversion in the alternative. From the evidence already referred to, it is clear that the trespass in this case was accompanied by actual deprivation of possession so that a case of conversion is indeed made out on the facts. This court has persistently followed the law laid down in General and Finance Facilities Ltd v Cook’s Cars (Romfold) Ltd [1963] 2 ALL ER 314 where it was held that damages in an action for conversion is for a lump sum of which the measure is generally the value of the chattel at the date of the conversion, together with any consequential damage flowing from the conversion and not too remote to be recoverable in law.”*

I would apply these principles in the present case. Again the law is that the value of the goods is to be taken as the market price at the time of conversion. In the

absence of the market price, damages are as measured by the cost of replacement of the goods converted (See Chiwaya v Sedom (*Supra*); J and E Hall Ltd v Barclay [1937] 3 ALL ER 620).

The market value of the Mercedes Benz engine is not to be found in the evidence. Neither was it pleaded. I have examined the documentation in evidence. None of them indicates the value of the engine at the time of purchase. The only document that may be of assistance is Ex M 3 receipt for the duty paid on consignment for which a bill of entry is not required. Although the document is faint it appears that K128,000.00 was paid to Malawi Revenue Authority clearing the engine. I am of the view that in the absence of proof of the actual value of the engine at the time of conversion, I attached to it the sum of K450,000.00 as the value of the engine at the time of conversion as an amount I consider reasonable. I award the Plaintiff that sum.

There is a claim for loss of use. There is no evidence to show that the engine could be used on the condition in which it was. The cases that the Plaintiff counsel cited awarding damages for loss of use relate to cars that were converted. (See Hassan v Adani t/a Adani Garage [1993] 16 (1) MLR 116; Khundi v Attorney General Civil Cause No. 281 of 1999 (*Unreported*)). In the present case we are dealing with a vehicle engine only. It is extremely difficult to calculate damages for loss of use in those circumstances. I am unable to make an award for loss of use.

I however grant the Plaintiff costs of these proceedings.

**PRONOUNCED** in Open Court this 22<sup>nd</sup> day of July, 2009 at Lilongwe.

R.R. Mzikamanda

**J U D G E**