

The Judiciary



IN THE HIGH COURT OF MALAWI

MZUZU REGISTRY

CIVIL CAUSE NUMBER 10 OF 2016

BETWEEN

NOKUTCHIPA MWAKANYAMALE PLAINTIFF

AND

MJURO NYIRENDA (GVH Gweleweta).....1ST DEFENDANT

TRADITIONAL AUTHORITY KILUPULA..... 2ND DEFENDANT

CORAM: A.J. BANDA, ASSISTANT REGISTRAR

Mr. Mbulo, of counsel, for the Plaintiff

Mr. Nyirenda, of counsel, for the Defendant

Mrs. F.M. Luwe, Clerk/Official Interpreter

Banda, AR

ASSESSMENT ORDER

Background

The plaintiff obtained an interlocutory injunction against the defendants on 25th January, 2016 restraining the defendants and their agents from taking possession or otherwise dealing with a piece of land under dispute of the right of use between himself and villagers in the 1st defendant's village. The originating summons were later heard *inter partes*. The honourable Justice DeGabriele did find for the defendants in her judgment of 28th April, 2017. The injunction was vacated, and the honourable judge ordered, among other orders that the plaintiff

should compensate the defendants for the loss of crops for one season that had been occasioned by the injunction which was obtained ex parte, and held without merit after *inter partes* hearing.

I did hear the parties on 11th July, 2017 and on 7th September, 2017, for the purposes of assessing the damages payable as ordered.

Evidence

The plaintiff had 8 witnesses in total who are all rice farmers of Gweleweta village who said were affected by the injunction.

Yotamu Mjuro Nyirenda told the court that he was the Principal Village Headman Gweleweta, of Gweleweta village in Traditional Authority Kilupula's area in Karonga. He said that on 14th November, 2014, there was a fierce fight between the people of Mwakanyamale village and Gweleweta village over land, as the people of Mwakanyamale village had encroached into the Gweleweta village farmland. He said the land was for his people whom he defended on behalf of, namely Frank Mwakilanga, Susyo Chawalanga, Akimu Mtambo, Maclean Ng'oma, Alick Mwakimbwara, Abraham Mwasyowe, Ambirikire Mwakilama, Harry Mkandawire, Samuel Mwakayira, Finesi Naghambi, King Mwang'onda, Rhoda Kalindire, Mateyo kaluwa, David Mwalywayo, Lakosi Munthali, Owen Nyirenda, Tulyana Mwawayo, Jembemuziro Munthali, Shadrack Mwakiwinga, wakisa Mwaihake, McPherson Mphande, Sande Mwalukambwe, Wakisa Mbukwa and Mboni Mwasanga.

Yotamu Mjuro Nyirenda further said that the people of Gweleweta village were stopped from using the land they had been using by a court injunction, such that for a full growing season of 2014 and 2015, the land was used by the people of Mwakanyamale. He said the people of Gweleweta could produce at least 18 bags of rice per acre on that land. He said in the 2011/2012 season the total area produced about 700 bags of rice, each weighing 50 kg, whilst in the 2013/2014 season the rice output of the land was 725 bags of 50 kg each. He said a 50kg bag of rice was fetching K15,000.00 on average.

Shadreck Mwakiwinga told the court that that he was one of the villagers at Gweleweta that were affected by the injunction that was taken by the plaintiff. He said that for a full rice growing season he did not grow rice in his 2.5 acres of land which produced him 52 rice bags weighing 50 kg. He gave an instance of the farming year 2011/2012, where he said he produced 49 bags of rice, whilst in the year 2013/2014, he produced 52 bags of rice. He said that he lost about K800,000.00 in the 2014/2015 farming season because of the injunction as a 50 kg bag of rice costed K15,000.00 on the market.

Mboni Mwasanga told the court that the total land which he had possession of, out of the 40 acres affected by the injunction was 3 acres. He said he would produce, on average, 45 to 57 bags of rice weighing 50 kg in a growing season. Wakisa Mwaihake told the court that the land under the jurisdiction of Mjuro Nyirenda that was affected by the injunction is 40.25 acres. He said his own area was 0.25 acres in which he would produce 5 to 6 bags of rice. He said in the 2014/15 growing season their land was used by the people of Mwakanyamale. He said as such he lost a monetary value of about K75,000.00.

Ambilikile Mwakilama of Gweleweta village said that his land was 4 acres out of the 40 acres, and he averaged 70 to 72 bags a season. King Mwangonda said he lost about 14 bags in the season that he did not grow rice because of the injunction, whilst Fyness Ghambi said her land was 0.75 acres and she lost a monetary equivalent of K210,000.00 as her land could produce an average of 14 bags. Tulyani Mwalwayo told the court his land in the 40 acres was 3.5 acres and he averaged 59 bags of rice a season. Owen Nyirenda told the court that he could not grow rice on his 2-acre land as the claimant obtained an injunction against him and other farmers in his village in the 2014/15 growing season. He said he lost out on 37 bags of rice that he normally produced on the land in the season, representing a value of K570,000.00.

The plaintiff had two witnesses. Nebston Mwaipaya told the court that he was the acting Group Village Headman Nokutchipa Mwakanyamale, in Traditional Authority Kilupula, in Karonga district. He said that he took legal proceedings at Ngerenge magistrate court against the defendants when he noticed that the subjects of the 1st defendant were encroaching in his

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village's twenty plots of customary land. He said the people continued to cultivate despite service of the summons. He said that he later took an injunction in the High court at Mzuzu but the 1st defendant's subjects did not stop cultivating on the land such that he commenced contempt of court proceedings against them but it was not heard as it was difficult to obtain dates when the Mzuzu registry of the High Court only had one judge. He said it was not true that the defendants were not cultivating on the land. He said they had actually continued. He said that in his village, a bag of 50kg of rice costed K7, 500.00.

Maxwell Kalua told the court that the defendants were the ones that were wrong as they were gardening in his land. He said he did not know Mwakilama, Mwangomba and Nyirenda but Mjuro as the leader of the 7 others that were looking for damages.

Issue

The amount of damages that the claimant should pay the defendants for the loss the defendants incurred in not growing their rice on the land that they were occupying prior to the needless injunction that the claimant took against them.

Analysis of law and fact

It must be stated at the outset that this is an assessment of damages. I say this because the claimant and his witness Maxwell Kalua did intimate in the assessment hearing that he did nothing wrong but it was the defendants that were interfering with his land. As submitted by counsel for the defendants, it was stated in the case of **Mzumbazumba Enterprises versus H. Amosi Transport Company Limited [1992] 15 MLR 370**, that assessment of damages presupposes that damages have already been proved and that it is only a matter of finding the right value of those damages.

In this case, a finding of liability that the plaintiff must compensate the defendants was found and ordered by the judge when he heard the two parties on merits pursuant to the interlocutory

injunction that was obtained by the claimant. The honourable Justice DeGabriele in her typed judgment on page 10;

That the injunction that was obtained by the plaintiff on 25th January 2016 BE and is HEREBY vacated with costs. The plaintiff is hereby ordered to indemnify the defendants for the period the injunction was subsisting, as per his undertaking in the said order of injunction. In addition, the plaintiff is further ordered to compensate the defendants for the loss of crops for one season that has been occasioned by the injunction.

The assessment hearing therefore was not held to find which party was wrong against which party or whether the defendants had continued to farm on the land despite the injunction being granted. That issue was already resolved in trial by the judge. It was open, as of right for the plaintiff to appeal the decision of the honourable judge to a superior court. He did not. He has not. It is therefore from that order by the trial judge that the assessment of damages proceeded in this matter. The registrar only assumed ancillary jurisdiction to determine the amount of value payable by the plaintiff to the 1st defendant's subject.

In **Livingstone v. Rawyards Coal Co [1880] 5 AC 25** Lord Blackburn pointed out that where any loss is to be compensated by damages, in setting the sum of money to be given for reparation, the court should nearly as possible award the sum of money which will put the party that suffered loss in the same position as he would have been if he had not sustained the loss for which he is being compensated. The damages recovered must in monetary terms be more and no less than the plaintiff's actual loss- see the case of **Annie Chilunga v. Duncan Nyalugwe, PI Cause number 659 of 2011.**

It is not in dispute in this case that the land which the 1st defendants' subjects were deprived of farming for a season was 40.2 acres. It was in the evidence of Yotamu Mjura Mkandawire that an agricultural expert measured the land. Even though the expert was not paraded to testify on this aspect, the plaintiff does not challenge it either. It is also my finding despite the witnesses on both sides in this matter going back and forth about the particularity of the season in issue, that the particular growing season was the 2015 to 2016 season. The injunction on file shows

the injunction was endorsed by the court's registrar on 25th January, 2016. It is also recognised as such in the judgment of honourable Justice DeGabriele.


I also find from the evidence that in two seasons, the land produced 700 bags and 725 bags of rice. These are bags that are filled with three 'tins' of rice that sell at an open market price of K5,000.00 each tin, in the community of the farmers, the actual market that the defendant farmers sell their rice to. this explanation the court believes as normally rice is sold in tins at ordinary markets. I do not believe the evidence of Mr Nebston Mwaipaya that a bag of rice weighing 50kg sell at K7,500. It is against the weight of evidence as given by Mr. Mjuro Nyirenda which is to the effect that a bag of '50 kg' measure fills up by three 'tins' and that a tin sells at K5,000.00 and the 50kg bag sells at K15,000.00, which the rest of the defendant witnesses corroborated.

In the one season that the defendants suffered loss, on average they lost on a harvest of 713 bags of rice (the average of 700 bags of rice for one known season and 725 bags for another known season, representing 2,139 tins at K5,000.00 each tin. The loss was therefore a total of **K10, 695, 000.00. (Ten million, six hundred and ninety-five thousand Kwacha).** The plaintiff must pay this sum to the defendant's subject, to be shared among the individual farmers in proportion to the size of their land mathematically.

Conclusion

The plaintiff must pay the sum of K10, 695, 000.00 as damages to compensate the defendant's subject for the loss of growing their rice for sell for one growing season, over their land. The plaintiff should also pay costs of the assessment hearing.

Made this 25th day of June, 2018.



Austin Jesse Banda

ASSISTANT REGISTRAR