



THE JUDICIARY

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 1144 OF 2009

Between:

OBREN P. PENULO..... CLAIMANT

-and-

TONY LEMUTCHA..... 1ST DEFENDANT

CORAM: Texious Masoamphambe, Deputy Registrar

Mndolo, for the Plaintiff

Counsel for the Defendants, not present

Ms. M. Galafa, Clerk/ Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

Background

The plaintiff commenced the action against the defendant on 2nd June 2009. He was claiming the delivery of the vehicle and costs of repair, or alternatively; the selling [price of the vehicle and interest thereon calculated at 1% above commercial bank lending rate. Further, he claimed damages for conversation, and costs of the action. On 28th April, 2010, the plaintiff obtained a default judgment in action relating to detention of goods pursuant to Order 13 Rule 3 and Order 19 Rule 4 of the Rules of the Supreme Court. There was an option that if the vehicle, registration number **MJ 96**, Mercedes Benz, was to be delivered within 14 days, the default judgment would be dropped. Failure would lead to assessment of damages for the detention of the vehicle.

Evidence

The claimant invited one witness, the claimant himself. He was the owner of the motor vehicle, Mercedes Benz registration number **MJ 96**. He exhibited thereto a copy of the blue book as proof of ownership of the said vehicle and the same was marked **Exhibit OPP 1b**. His testimony was that he knew the defendant as someone who was into the business of buying and selling vehicles.

In around April, 2007, the defendant approached him on the said vehicle telling him that somebody was interested in buying the vehicle. Although at the time the claimant did not want to sell the vehicle, he agreed to sell the vehicle. On reliance that there was a ready buyer for the vehicle, he

allowed the defendant to collect the vehicle. The defendant did collect the vehicle on or around 9th April, 2007 and they agreed that he should sell it at **K 320,000.00** and further that he should contact him as soon as the vehicle was sold. This agreement was reduced in writing and a copy of the agreement was tendered as part of his testimony and marked as **OPP 1c**.

After two weeks there was no word from the defendant. Upon being asked, the defendant told the claimant that the vehicle had not been sold because the person who had earlier shown interest in the vehicle was no longer interested. The defendant though assured him that the vehicle would be sold.

Later the defendant indicated to the claimant that he would just buy the vehicle and that the payment would come from a Mr. Anthony M. Kamwiyo whom he said was buying a vehicle from him. The claimant exhibited a draft copy of the later agreement which they did not execute and the same was marked as **Exhibit OPP 1d**. However, the defendant never delivered the vehicle to Mr. Anthony M. Kamwiyo and as a result the claimant received nothing from either a Mr. Anthony M. Kamwiyo or the defendant.

In the circumstances, he demanded for the delivery of the vehicle but the same proved futile. He then approached his lawyer who demanded for the immediate delivery of the vehicle but there was still nothing.

There being no response, he instructed his lawyers to commence the present proceedings for the delivery of the motor vehicle and costs of repairs or in the alternative the selling price of the vehicle and interest thereon. He also claimed for the damages he had suffered as a result of the defendant detaining his vehicle.

He further told the court that he used to use his vehicle for domestic purposes like going to and from work, picking his family, going to church and so many other things. In short, he had mobility problems because he had intended to replace it using the proceeds from the sale. It was in his testimony that on top of the domestic use, the vehicle was also bringing him some income. He could pick people on his way from work and each person would pay **K100.00**. Further, during the weekends, the car would be parked at the rank and in a day he could make an average of about **K 3,500.00**. Thus, in a month, he could make about **K12,000.00** after taking into account fuel expenses. The business being very small, he never recorded anything, so he told the court.

Issue

The main issue at this point is what amount would be sufficient as damages for the loss suffered by the plaintiff as a result of the detention or conversion of his motor vehicle by the defendant.

The law and analysis

The High Court in **Ngosi t/a Mzumbanzumba Enterprises v H Amosi Transport Co Ltd [1992] 15 MLR 370(HC)** set the basis for assessment of damages:

“Assessment of damages...presupposes that damages have been proved. The only matter that remains is the amount or value of the damages.”

The rule is that prior to assessment, the injured party has provided proof of damage sustained- **Yanu yanu Co Ltd v Mbewe(SCA)11 MLR 405**. Even in the face of difficulties in assessing damages, the claimant is not disentitled to compensation-**Mkumuka v Mphande(HC)7MLR 425**. The cardinal principle in awarding damages is 'restitution in integrum' which means, in so far as money can do it, the law will endeavour to place the injured person in the same situation as he was before the injury was sustained-**Halsbury's Laws of England 3rd Ed.Vol.II p.233 para 400**. This principle was further enunciated in **Livingstone v Raywards Caol Co. (1880)5 App Cas 25 at 39**, where **Lord Blackburn** said:

"...where any injury is to be compensated by damages, in settling the sum to be given for reparation you should as nearly as possible get at the sum get at the 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 had he not sustained the wrong for which he is now getting his compensation or reparation."

In the present case, clearly there was conversion. In the case of **H. H. Chikaoneka t/a Madalitso Cothing Factory vs Indefund Limited, Civil Cause Number 1155 of 1994 (HC)**, Justice Twea as he then was noted that:

*"The tort of conversion consists of depriving another of his property without his authority. It is said to be-
'an act of wilful inference without lawful justification with any chattel in a manner inconsistent with the right of another whereby that other is deprived of the use and possession of it.'"*

In the case at hand the defendant collected the vehicle from the claimant and promised to sell it and give him the proceeds. That never happened. Neither did he deliver back the vehicle. There was no evidence to the contrary. It is evidently that the claimant was deprived of his chattel and or proceeds.

In the case of **H. H. Chikaoneka t/a Madalitso Cothing Factory vs Indefund Limited, M.S.C.A. Civil Appeal Number 22 of 2001**, (unreported), the court had this to say with regard to assessment of damages for conversion of goods:

"The law is clear on the issue of assessment of damages for conversion of goods. The plaintiff in a case of conversion is entitled to the value of the goods at the time of conversion and any loss arising therefrom which would include change in the market value of the converted goods; such loss is termed consequential loss: see Sachs vs Miklos and other (1947) C. A 24; See also M^C GREGOR ON DAMAGES 15TH ED PAR 1313".

Value of Motor Vehicle

The defendant clearly indicated on Exhibit OPP1B that *"taken Mercedes Benz vehicle from Mr. O. P. Panulo at the value of K320,000.00 to be sold. He will be contacted as soon as the vehicle is sold."* The sale never happened, and neither did he deliver back the vehicle. In **Hassan vs Adani t/a Adan's Garage [1993] 16 (1) MLR 109 at 115 Unyolo J.** as he then was had this to say:

"Where, however, the plaintiff sues in conversion, he recovers the value of the goods at the date of the conversion together with any consequential damages flowing from the conversion and not too remote to be recoverable in law. Per

Diplock LJ in General and Finance Facilities Ltd. V Cookes Cars (Bromford) Ltd [1993] 2All ER 314 at 317-319.”

It is therefore clear from the above that in the present case the claimant is entitled to the value of the motor vehicle at the time of conversion which is **K320,000.00**.

Loss of use and Inconvenience.

It was held in the case of **Namandwa v. Tennet and Sons Ltd 10 M LR 383** that normally loss of use is a conventional figure that takes into account the value of the chattel and period for the lost use, in this case the motor vehicle. In the present case the plaintiff has been deprived use of his motor vehicle from 9th April, 2007 to date. There is uncontroverted evidence before the court that he used to use his motor vehicle for a number of things including when going to and from work, going to church, picking his family and earning money. The motor vehicle in issue was not as prestigious at the time of conversion.

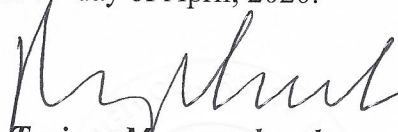
In the case at hand assessment of damages was only done in November, 2010, representing 3 years and seven months. In the case of **Nakoma vs Kachingwe and Reunion Insurance Company Limited Civil Cause Number 7 of 2010**, the plaintiff was deprived use of his motor vehicle for 49 days and the court awarded him **K150, 000.00** as damages for loss of use. Three years and seven months translate to 108 days. A sum of **K 4,000,000.00** would therefore be a fair compensation for loss of use in the instant case.

The plaintiff was obviously inconvenienced. As stated already, he was using his vehicle when going to and from work and church, picking his family and earning money. **In Potex Kamenya Banda vs. Mr Zhao Civil Cause Number 939 of 2009**, the plaintiff who was detained for only six hours was awarded **K 150,000.00** over and above damages for false imprisonment. The Plaintiff has been deprived use of his vehicle for more than three years. In that period, he had to find another way of travelling to and from work and church. So too his family. In the present case I am of the view that the sum of **K 4,000,000.00** would fairly compensate the plaintiff for inconvenience.

Conclusion

In conclusion, it is the considered view of this court that the sum of **K 8,000,000.00** will adequately compensate the claimant for damages for loss of use and inconvenience, and **K320,000.00** for the value of the motor vehicle at the time of conversion. Costs are for the claimant.

Made in chambers this Thursday, the 9th day of April, 2020.


Texious Masoamphambe
DEPUTY REGISTRAR