15-11-94

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.39 OF 1993

BETWEEN

TEA BROKERS (CENTRAL AFRICA) LTD. ..... PLAINTIFF

AND

R. M. BHAGAT ..... DEFENDANT

CORAM: MWAUNGULU, AG. J.
Kasambala, Counsel for the Plaintiff
Msiska, Counsel for the Defendant

JUDGMENT

Mwaungulu, Ag.J.

In this action the plaintiffs, Tea Brokers (Central Africa) Limited, are seeking the common law remedy for damages and the equitable remedy of an injunction for trespass to their piece of land by the defendant, Mr. Bhagat. On the general issue the plaintiffs should succeed. There is so much in the evidence to show that the defendant did unjustifiably interfere with the possession of the land of the plaintiffs. There is, therefore, justification for the two remedies at common law and equity which the plaintiffs have prayed for in this court.

The plaintiffs and the defendant are on contiguous pieces of land, Plot No. LC 18 and Plot No. LC 15, respectively, along Livingstone Avenue in the commercial City of Blantyre. The plaintiffs piece of land is freehold. At the time of the action, it was owned and occupied by the plaintiffs. The plaintiffs carry out the business of packing and selling tea. It is not known from the evidence and the pleadings what the defendant does on his plot of land. The problems in this case have arisen because of construction and developments on Plot No. LC 15, owned by the defendant.

The plaintiffs are so meticulous, exquisite and soigne about the way they keep their premises. Visiting the site, even in October, when it is very dry, you are met with green turf and a

vista of beautiful flowers. They also seem to be quite particular about the borders that demarcate their freehold property. They have virtually fenced the two sides on their plot bordering other plots. They have, however, left open that part of the plot which adjoins Livingstone Avenue. Mr. Gunton, the Managing Director, informed the court that the fencing is not of recent import; it was part of the protection of their property. The plaintiffs, however, kept unfenced that side of the plot that borders with the defendant's plot. They kept a bougainvillea hedge for quite some time. When the decision was made to have the property fenced, this side of the fence that borders with the defendant's plot was not fenced. The explanation is that the bougainvillea hedge, in its immaculate condition, provided the beauty and the security which the company dearly wanted to maintain.

Some time in 1991, however, the defendant had ambitious and expensive plans to develop his piece of land. To that end a huge four-storey building, apparently for commercial purposes, is under construction on his plot. It is an imposing building on this street. It looks like Plot No. LC 15 is not big. The building there has been built in such a way that it occupies as much space as is possible on the plot. The northern wall on the side where Plot No. LC 15 borders with plot No. LC 18 is very very close to the boundary with Plot No. LC 18.

The action in the present case is in relation to trespass on Plot No. LC 18 occasioned by the construction and development works to this building on Plot No. LC 15. The allegation from the pleadings is that dirt, rubble and bricks have been left by workers at Plot No. LC 15 on Plot No. LC 18. The plaintiffs allege that this depositing of rubble and dirt on their plot has been so continuous and intense in the period of construction and development on Plot No. LC 15 that it has resulted in destruction of the hedge and near disappearance of the beacons which demarcate the two adjacent plots of land. Consequently the plaintiffs have had to call surveyors to rediscover the beacons and keep the boundary visible and clear. The plaintiffs have also had to contact some horticulturist to reinstate the bougainvillea hedge destroyed by the developments on Plot No. LC 15. The plaintiffs further alleged that on several occasions the defendant's attention had been brought to the problems on the plot. While once or twice there has been a response from the defendant, on several occasions, their requests were spurned. They also sought a court injunction which the defendants have also ignored. This action, therefore, is for damages for the trespass and for an order to restrain the defendant from continuing the trespass on the land.

The defendant, however, denies that he deposited debris, rubble or bricks on the plaintiffs plot. He also denies that the plaintiffs garden and hedge have been damaged. If it has been damaged, he alleges, it must have been so before the construction works started on their plot. He, therefore, asserts that there has been no damage for which the plaintiffs should be compensated; neither is there any need for the injunction prayed for.

In this action, in my view, I am called upon to decide whether there was trespass and, if so, whether the plaintiffs are entitled to the remedies which they seek. On the first question, the evidence before me clearly shows that the defendant did enter on the plaintiffs' piece of property. The defendant, on oath, conceded that once or twice, when called upon by the plaintiffs, did remove the dirt that had accumulated on Plot No. LC 18. The defendant, in my view, was astute to minimise and downplay the frequency of his intrusions into the plaintiffs' property. Given the amount of construction work that was going on on the plot, and the proximity of the building under construction to the plaintiffs' plot, I find it extremely difficult to think that there could only have been two forays on the plaintiffs' plot. I accept the plaintiffs contention that the incursions have been repeated quite often, if not, so reasonably often in the duration of the construction and development works on Plot No. LC 15.

It must be appreciated that trespass is an unjustifiable interference with possession of land (Hegan v. Carolan (1916) 2 TR.R 27). An action for trespass is a common law action. As it was put by Lord Chief Justice Camden in Entick v. Carrington (1765) 2 Wils. 275, by the law of England every invasion on private property, however minute, is a trespass. An action in trespass will lie for injury to that right although no appreciable damage has been caused (Warren v. Desplippes (1872) 33 UCR 59)(Canada). Even if the incursions on Plot No. LC 18 are as few as the defendant wants me to believe, an action for trespass will still lie. Although the plaintiffs did not plead about the props which the defendant planted on Plot No. LC 18, for construction works on the building, the defendant raised the matter in his own evidence and went on to state that those props, which in law would be sufficient trespass (Westripp v. Bowdock (1939) 1 All E.R. 279), are still necessary for the remaining part of construction works. The minuteness of the trespass will only go to determine what amount of damages should be awarded and whether the court should grant an injunction as the plaintiffs have prayed. It does not gainsay trespass.

It may now be the right time to decide whether the defendant's trespass caused the damage pretended by the plaintiffs. The defendant alleged that no damage was done at all by the activities going on on their plot. Further it is said that, if there was, the damage was prior to the developments and construction work began on his plot. I did visit the scene. Obviously the hedge on Plot No. LC 18 was haggard and irregular. In some cases, it was almost non-existent. The construction work has been going on for a number of years. Although there has been a resurgence in certain parts of the hedge there is an indication that some damage, and indeed of a considerable nature, has been had to the hedge. If the question is whether this was prior to the construction work going on on Plot No. LC 15, I am more comfortable with agreeing with the plaintiffs that the damage has been caused by the developments on Plot No. LC 15. There are reasons for it. First, I have indicated that this was a major construction work. It is not complete even though it started in 1991. The building has been built so close to the border with

the plaintiffs plot. As I am speaking here, the major props for construction work are right in the plaintiffs piece of property. Given the space that exists between the boundary and the northern wall of the building, such major works would not have been without daily and rigorous intrusion into Plot No. LC 18. There is an added reason. I have indicated that the plaintiffs keep their surroundings and premises gracefully and with a bit of raffine. I have little problems in finding that the way they keep the rest of the property applied to this hedge. If that is true, the hedge could not have been in the chequered state in which it is now. I have also stated before that Mr. Gunton told the court that that the same time as they were deciding to put a fence around their property, they decided not to do the same on the border with LC 15 because, he said, the hedge sufficed for their security and beauty purposes. I would, therefore, find for the plaintiffs that the damage to the hedge, which was considerable, was caused by the construction work on Plot No. LC 15 and was not prior to these activities.

The last factual issue relates to surveys which the plaintiffs requested to re-locate the beacons and make them more pronounced. The evidence on this aspect is exciting. The defendant contends that there was nothing wrong with the beacons. In fact, he says, there were beacons and they were there for everyone to see. He has charged that the City Council and Town Planning would not have authorised construction work to begin if those beacons were not located. That, in my view, stems from a misunderstanding of what the plaintiff actually said. Although the plaintiff was exaggerating on the height of the debris, he did say that the beacons were covered from time to time by debris as the construction was going on. For that reason the surveyors had to be called to keep on re-locating the beacons. I will be considering the necessity of such exercise when I come to consider the question of damages. It suffices for purposes of the general issue to state that there is sufficient evidence on balance of probabilities to show that the beacons were intered by debris from time to time.

The next aspect, therefore, relates to the remedies which the plaintiff seeks against the defendant. The plaintiffs want to recover damages and also want an injunction against the defendant. Let me consider first the question of damages. The general rule, as I understand it, is that where there has been no actual loss or damage to the plaintiff's land the damages will only be nominal (Armstrong v. Sheppard (1959) 2 All E.R. 651). Where, however, there has been actual loss or damage the plaintiff is entitled to recover. Since Jones v. Goodey (1841) 8 M & W 146, it had been said that the normal measure of damages was the amount of the diminution of the value of the land because, in that case, the alternative measure of cost of replacement or repair, that is to say, the sum which it would take to restore the land to its original state was rejected. That decision, however, has had some problems. The test which has been accepted seems to be the reasonableness of the plaintiff's desire to reinstate the property to its original position in relation to the damages to be awarded by the

diminution in the value of the land. This approach seems to agree with common sense. If, for example, the diminution in the value of the land is K20.00, if re-instating it costs several million Kwacha, it would be unreasonable to require the defendant to bear that expense. On the other hand, if the diminution in the value to the land affects the total value of the property then what the plaintiff loses is not the slight diminution in the value of the land but the whole land itself. This approach seems to come out very clearly in the House of Lords decision of Lodge Holes Colliery Company v. Wednesbury Corporation (1908) A.C. 323.

In that case, due to the defendant's trespass, the local authority re-constructed a road without consultation with any experts when there was a cheaper way of doing that. When they sued for the cost of replacing the road, the court said they could not recover to that extent but to the extent proven to be the cheaper way of doing the work. The judgment of Lord Loreburn, Lord Chancellor, with which Lord Justices McNaughten and Atkinson agreed, underscores the approach to this difficult problem. The Lord Chancellor stated that the court will not candidly take heed of any objection by the defendant, the wrong-doer, on the methods adopted by the victim of the wrongful act.

> "Now I think a court of justice ought to be very slow in countenancing any attempt by a wrong-doer to make captious objections to the methods by which those whom he has injured have sought to repair the injury. When a road is let down or land let down those entitled to have it repaired find themselves saddled with a business which they did not seek, and for which they are not to blame. Errors of judgment may be committed in this as in other affairs of life. It would be intolerable if persons so situated could be called to account by the wrong-doer for a minute scrutiny of the expense, as though they were his agents, for any mistake or miscalculation, provided they act honestly and reasonably".

The court approaches the problem by considering whether the victim of the trespass in doing what he has done to make good the damage has acted honestly and reasonably. If he has done so, therefore, and the expense is not unreasonable, the court will side with the victim. The Lord Chancellor continued as follows;

> "In judging whether they have acted reasonably, I think a court should be very indulgent and always bear in mind who was to blame. Accordingly, if the case of the plaintiffs had been that they had acted on the advice of competent advisers in the work of reparation and had chosen the course they were advised was necessary, it would go a very long way with me; it would go the whole way, unless it became clear that some quite unreasonable course had been adopted".

The principles I have just stated relate to the normal measure of damage for trespass to land. In this particular case, unlike in Lodge Holes Colliery Co. Ltd. v. Wednesbury

Corporation, the plaintiffs sought the opinion of a horticulturist. The holticulturist came up with a quotation of the expense. The defendants contend that all that could be done to the hedge would be to put in a few more plants in the patches and this would be cheaper than what the plaintiff has planned to do. I have problems with that stance. In the first place it will take some time before those plants could reach the level of the new hedge. Moreover, the plaintiffs have always kept their premises at a certain level of beauty which, in my view, is not sumptuous. They are justified to bring the hedge to the same level of presentability. The quotation, to me, is neither oppressive nor unreasonable. Furthermore, the defendants have not come up with an alternative expense or quotation as was done in Lodge Holes Co. v. Wednesbury Corporation to show that the course taken by the plaintiff was unreasonable. I would, therefore, award the plaintiffs the cost of replacing the hedge as prayed.

Apart from the cost of replacing the hedge, the plaintiffs are also entitled, in my view, to the expense of bringing the surveyor to re-locate the beacons and the boundary between Plot No. LC 18 and Plot No. LC 15. That they are entitled to this expense was decided in Rose v. Miles (1815) 5 M & S 101. It was contended by the defendant that it was not necessary to have the two or so surveys which were conducted. My assessment of the situation is that what the plaintiffs did was not unreasonable in the circumstances. As we have seen, the building has been built so close to the border that there is very little space between it and the border with Plot No. LC 18. The defendant kept on putting debris on the beacon. Definitely if the beacons were not open for everyone to see, there was a whole possibility in the circumstances of a whole encroachment into the plaintiffs' plot either deliberately or mistakenly. In any case, the plaintiffs were opposed to any incursions into their piece of property. Those incursions could only have been noticed if the boundary was clear and for all to see. More importantly, the plaintiffs' piece of land is freehold. They were entitled to protect every centimetre of it. I find, therefore, that the plaintiffs are also entitled to damages for the surveys.

The final question on the amount of damages is a matter that was considered by the Court of Appeal in Whitwham v. Westminster Brymbo Coal and Coke Company (1896) 2 Ch. at page 538. The principle was expressed diversely by the Lord Justices of the Court of Appeal. At page 541 Lord Justice Lindley said:

> "The plaintiffs have been injured in two ways. First, they have had the value of their land diminished; secondly they have lost use of their land, and the defendants have had it for their own benefit. It is unjust to leave out of sight the use which the defendants have made of this land for their own purposes, and that it lies at the bottom of what are called 'way leave cases'. Those cases are based upon the principle that if one person has without leave of another used that other's land for his own purposes, he ought to pay for such use".

Lord Justice Lopes said:

> "Now, applying that principle here, what else have the plaintiffs suffered in consequence of the wrongful act of the defendants? The value of their land beyond all question has been diminished; and Mr. Russel admits that the plaintiffs are entitled to be paid in respect of that. But there is something more in respect of which I think the plaintiffs are entitled to be compensated and that is for the use the defendants have made of the plaintiff's land during some eight years past".

It is, however, in the judgment of Lord Justice Rigby where, apart from the principle just quoted from the two Lord Justices, is raised a way of assessing damages for that use. At page 543 Lord Justice Rigby said:

> "The principle is that a trespasser shall not be allowed to make use of any person's land without in some way compensating that other person for that use. Where the trespass consists in using a way over the plaintiff's land a convenient way of assessing damages may be an enquiry as to way leave which, when there is a customary road, the charge for way leave of the court may furnish a convenient measure of damages; but the principle is that in some way or another, if you can do nothing better then by rule of thumb, the trespasser must be charged for the use of the land".

The plaintiffs in this case want aggravated damages. The aggravation is in the defendant's persistence in the trespass in respect of numerous requests for him to desist. This includes flagrant disobedience of a court injunction personally served on him. In an action for trespass damages can be awarded for aggravation. They were so awarded in Steel Fabrication Industries v. Norse International Limited., Civil Cause No.269 of 1984 (unreported); Unango Estates Limited v. Michael, Civil Cause No.487 of 1983 (unreported) and Muleme v. Pantazis, Civil Cause No.666 of 1987. So on the question of damages, therefore, I award the plaintiffs the sum of K5,000.00. This sum takes into account the aggravating circumstances in this case. You will notice that they are above the amount that the plaintiffs has actually suffered as proven. For the use of the land for the past three years or so, there has been no evidence of the charge for way leave. I award the plaintiff the sum of K2,700.00.

Finally, the plaintiffs pray for an injunction. That the court can grant an injunction in this case is clear from Kelsea v. Imperial Tobacco Company (of Great Britain and Ireland) Ltd. (1957) 2 All E.R. at page 343. The construction works have lasted for the past three years. Although the building works have finished, the defendant conceded that there is still a little more to do. This case is akin to the case of Woollerton & Wilson Ltd. v. Richard Costain Ltd. (1971) All E.R. 488. In that case an injunction was suspended because the defendant offered compensation and the trespass would not last

indefinitely. In the case under consideration, however, there has been no such offer for compensation and as we have seen the prospect of other trespasses has not been ruled out. That decision, however, was overruled in John Trenbirth Ltd. v. National Westminster Bank Limited (1979) 39 P & CR 104 in which the court refused to suspend an injunction against the bank which trespassed in order to repair its premises. One of the reasons why an injunction would be refused is where the trespass is of a trifling nature. The trespass here is not of a trifling nature. Even if it is trifling, it has continued for the past three years with no prospect of finishing in the near future. The defendant, of course, has made undertakings in this court to abide by the injunction. I do not think, judging by his previous conduct, he would so abide unless an injunction was granted and I so grant it. The plaintiff is entitled to the cost of the action.

MADE in Chambers this 15th day of November, 1994 at Blantyre.

D. F. Mwaungulu
ACTING JUDGE