Counsel Makwinja
Lughano Mwabutwa

JUDICIARY

IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY
CIVIL CAUSE NO. 75 OF 2014

BETWEEN

ANDREW MAKHALIRA.....PLAINTIFF

-AND-

OPPORTUNITY INTERNATIONAL BANK .....DEFENDANT

: **HONORABLE JUSTICE R.E. KAPINDU**
: Mr. Ndlovu, of Counsel for the Plaintiff
: Mr. Mwabutwa, of Counsel for the Defendant
: Mr. Nkhwazi, Official Interpreter
: Mrs. Mboga, Court Reporter

JUDGMENT

Kapindu J,

BACKGROUND

1.1 The plaintiff brought this action against the defendant claiming damages for trespass to property, detenue, conversion and costs of the action. The background of the matter is that the defendant granted a loan in the sum of MK1, 500,000 to Mrs Chimwemwe Lisimba with a repayment period of 12 months. Mrs Chimwemwe Lisimba defaulted on the loan repayment. As a result, the defendant decided to realise the loan repayment through seizure of collateralised items, and the seizure that ensued has culminated in the present action.

EVIDENCE

1.2 The following evidence was adduced during the trial:

1.2.1 PW1 Andrew Makhalira

(a) PW1 was the plaintiff himself and he testified that on the material day, the 15th of August 2013, he was in the Republic of South Africa and that whilst there he received a call from Morgan Mazinga who said that he was from Opportunity International Bank of Malawi (OIBM), the Defendant. He stated that he came to his house, being house No. CHE 414 in Chiwembe in the City of Blantyre to collect the property which was allegedly pledged for a loan by Chimwemwe Lisimba.

(b) PW1 testified that he told the said Mr Morgan Mazinga that that was not Mrs. Lisimba's house and that there was no property in that house which was pledged as security for a loan. Mr Mazinga proceeded to seize from the house the following items: One 55 inches Samsung TV Screen, One Sansui Home Theatre, a Dublin Entertainment unit and a Kenwood cooker.

(c) PW1 testified that later in the day he got a call from Ms. Chimwemwe Lisimba that Mr Mazinga brought back the property he collected except the Kenwood cooker and that the Samsung TV Screen which had cracks on its front.

(d) Mr. Makhalira tesyified that when he came back from RSA on 24 August 2013, he wrote a letter to the defendant Bank stating that they had come to his house to collect good which he did not pledge nor did he guarantee them for anybody's loan. He stated that in the letter, de demanded an apology and return of the cooker. The letter was dated 29 August 2013. It was tendered in evidence and marked as exhibit "AAM1".

(e) PW2 stated that after about two months, Mr. Mazinga from the defendants came to return the cooker but that the Plaintiff demanded to see documents supporting the return, more so in view of his letter of 29 August 2013 to which he was yet to receive a response. He stated that Mr. Mazinga said the letter would come later from Head Office in Lilongwe. The Plaintiff refused to take delivery of the cooker. He said he would only accept delivery together with a supporting letter as demanded and that he also demanded to see the responsible people at OIBM.

(f) He concluded his evidence in chief by stating that since that day, he had not heard from the defendants again.

(g) During cross examination, Mr. Mwabutwa, Counsel for the defendant, dwelt significantly on the issue of the whereabouts of the Plaintiff during the seizure of the items. The Plintiff conceded that he was in the Republic of South Africa and that he heard about what happened from Chimwemwe Lisimba and his neighbours. He further stated that the officer from the defendant Mr. Mazinga spoke to him on the phone and told him that he would collect his property. He emphasised that when he came back, the Plasma Screen Screen had cracks and was not working, whilst the Kenwood Cooker had not yet been returned.

(h) He was also asked during cross examination why he did not sue immediately. He responded that he contacted his lawyers in October 2013 and that they advised him to wait for a response from the defendant to his letter of 29 August 2013.

1.2.2 PW2 Chimwemwe Kaombe Lisimba

(a) PW2, Ms. Lisimba testified she is a business lady and that she regularly travels to South Africa and other countries to buy goods and sell them in Malawi. She testified that she had obtained a loan from the defendant and that the guarantor thereof was her sister, Pamela Makwangwala, whom, she stated, stays with her at her house. She stated that as security for the loan, together they pledged a Refrigerator, an LG Home Theatre, an LG 42 Inch Television Screen and a microwave, abd that her sister pledged her Toyota Rav 4, Registration Number BP 6924.

(b) She testified that on the material day, i.e the 15th of August 2013, she was at the plaintiff's house because the plaintiff was away in South Africa. Whilst at the plaintiff's house, No. CHE 414 in Chiwembe in the City of Blantyre, she received a phone call from Mr Mazinga who said that he wanted to discuss with her the loan which she had with the defendant. She directed him to where she was at that particular moment being at the plaintiffs house No. CHE 414.

(c) It was PW2's testimony that when Mr Mazinga came to the house, he told her that he had come to collect the goods which were pledged as security for the loan. It was her evidence that she told Mr. Mazinga to go with her to her house No. CHE 158 where the said goods were, but that Mr Mazinga refused, stating that she was lying and that this was her house. He then proceeded to collect the plaintiff's house goods namely; One 55 inches Samsung TV Screen, One Sansui Home

theatre, a Dublin Entertainment unit and a Kenwood cooker. She stated that she then observed that there was a three tonner lorry waiting outside to take the goods away.

(d) She was emphatic in her testimony that she never pledged a Samsung Home Theatre nor did she pledge a Kenwood Cooker or Dublin Home Theatre. He stated that she refused to sign a document acknowledging that she had allowed the defendant to collect the goods because they were not her goods.

(e) During cross examination, Counsel Mwabutwa asked PW2 how PW3 got to her house. She explained that she told him the map so that he would find her where she was at the material time. PW2 vehemently denied when counsel Mwabutwa put it to her that she in fact led Mr. Morgan Mazinga from Limbe to the Plaintiff's house. She stated that Mr. Mazinga was shouting at her whilst collecting the goods although she did not say what exactly he was saying.

(f) PW2 testified that Mr. Mazinga was doing all this whilst shouting on top of his voice and that in the process, he attracted the attention of the neighbours. The goods were brought back after 2 hrs except the Kenwood cooker.

(g) She concluded her evidence by stating that the Rav 4, BP 6924 was never seized by the defendant.

1.2.3 DW1: Morgan Mazinga

(a) Testified that he is an external debt collector for the defendant.

(b) He tendered evidence showing Ms. Lisimba's repayment schedule and that she was in significant arrears at the material time. The Repayment Schedule was admitted in evidence and marked as exhbit "MM1". He also tendered the Bill of sale which was marked by the Court as exhibit "MM2". Exhibit "MM3" was the offer for a loan.

(c) He stated that on the material day, i.e the 15th of August 2013, he called Mrs. Lisimba and that they met at the defendant's Limbe Branch and that together they left for the plaintiff's house. He stated that he was with Mrs. Lisimba who directed him to the plaintiff's house. He stated that at the plaintiff's house he queried Mrs Lisimba about the pledged loan property and stated that they were stolen and that she only showed the Kenwood cooker as a replacement. He stated that he reminded her that the amount outstanding was

MK753,000.00 and she confirmed that she did not have the money to repay.

(d) In his evidence, he only acknowledged taking the Kenwood Cooker which he said Ms. Lisimba offered to him as part of the collateral. He further stated that the same was not in good condition. He stated that thereafter he contacted Pamela Makwangwala, the guarantor and that the defendant repossed the RAV 4 BP 6924 which had been pledged as security. He testified that the loan was later settled and the vehicle was redeemed. He stated that after a few weeks, the defendant took the Kenwood Cooker back to Mr. Makhalira's house but that he refused to take it back. He stated that the cooker is still at the OIBM warehouse.

(e) He proceeded to wonder why Mr. Makhalira came in claiming that he never had any contacts with him. He further stated that up to now (as at the date of the hearing) Ms. Lisimba actually still had arrears of up to MK153,000.00. He stated however that the evidence that was being given relating to the Plasma TV and Home theatre was false as he only took a Kenwood Cokker from the house.

(f) During cross examination, DW1 stated that on 15 August 2013 he was sent by the defendant and that he was direxcted by Chimwemwe Lisimba to House No. CHE 414. He stated that the instructions from his principals was that if the money outstanding was not there, he should recover the collaterals which he did. He was shown the list of goods pledged under exhibit "MM2". He confirmed that those were the pleadged goods and also that his instructions were to recover pledged goods that were on the list. He insisted that the reason he collected the Kenwood Cooker was because Ms. Lisimba told him to. Counsel probed whether the source of authority was Ms. Lisimba's word of mouth or the Bill of Sale. DW1 stressed that his authority derived from what Ms. Lisimba told him at the house.

(g) DW1 stated that he spoke to the Plaintiff on the material day after the Plaintiff had called him, and that the Plaintiff stated that the pledged goods had been stolen.

ISSUES

1.3 The following are the issues that fall for determination in this case:

(a) Whether the defendant is liable for trespass to property;
(b) Whether the defendant is liable for detinue;
(c) Whether the defendant is liable for conversion; and

(d) Whether the defendant is liable for shock, distress and injury to feeling

DETERMINATION OF ISSUES

1.4 Trespass

1.4.1 In order to prove a claim in an action of trespass to chattels or property, there must be some direct and immediate interference with the plaintiff's possession of a chattel or property. There must be intentional or careless direct interference with goods in the claimant's possession at the time of the trespass, whether that be by taking the goods from him, or by damaging the goods without removing them. See *Street on Tort* (Oxford University Press, 2012) page 281. In **Chiwaya vs SEDOM** [1991] 14 MLR 47 it was held that seizure of goods when not justified amounts to trespass.

1.4.2 In the present case, there is no dispute that Ms. Lisimba was in default of the loan. I listened very carefully to the evidence led by both parties. On careful assessment, I am inclined to believe the evidence of Mr. Mazinga as regards what really happened on the material day.

1.4.3 PW2 would like this Court to believe that after a conversation with Mr. Mazinga about her loan default, Mr. Mazinga asked for a face to face meeting with her without revealing the purpose and that she directed him to the Plaintiff's house. After Mr. Mazinga arrived at the house, he demanded security and that despite being told this was the Plaintiff's house, Mr. Mazinga (DW1) went on a rampage seizing whatever he could lay his hands on irrespective of what was contained in the Bill of Sale.

1.4.4 I am however convinced on a balance of probabilities that whether Ms. Lisimba directed the defendant to the Plaintiff's house over the phone as alleged by the Plaintiff; or that Ms. Lisimba directed Mr. Mazinga to the house as alleged by DW1, Ms. Lisimba was fully aware that the purpose of the visit was repossession. It was therefore wrong, either way, to direct the defendant to the Plaintiff's house. I am convinced that the circumstances were such that DW1 genuinely believed that the house was Ms. Lisimba's house and that PW1 and PW2 basically wanted to play tricks on him to evade repossession. I have looked at the Bill of sale that itemises the collateralised items. It did not specify the location of the goods. Their location therefore depended on the goodwill of the borrower to lead the defendant for repossession.

1.4.5 Another question arising is whether Mr. Mazinga was wrong to repossess a Kenwood cooker that was not listed on the Bill of Sale. He stated that Ms. Lisimba told him to. I believe him. According to MM3, the agreement,

at paragraph 9 on security for the loan, the security consisted the Bill of sale with specified collateralised items (sub-paragraph 9.1), and any other security and/or guarantees that the defendant held or which could be "given" to the defendant at the date of the contract "or in the future." A reading of clause 9 of the agreement clearly shows, in my view, that once he was convinced the house in issue was Ms. Lisimba's, and Ms. Lisimba offered the Kenwood Cooker as security, he was entitled to take it.

1.4.6 In the premises, I find that the seizure, although made in error, was justified and there was therefore no trespass.

1.4.7 Although Section 10 of the Bill of Sale Act requires that the goods to be seized should be personal chattels specifically described in the schedule containing inventory pledge for loan security, I have already found that the agreement itself extended the collateralisation beyond the Bill of Sale. I therefore find that there was no trespass on the plaintiff's property.

1.5 Detinue

1.5.1 The essential elements are that the plaintiff should have been entitled to immediate possession of the chattel and the defendant should have wrongfully detained the chattel after a demand had been made for restoration. Where there is no intention to keep the goods in defiance of the plaintiff's rights, detention will not be wrongful. See **Air Charters Ltd v Air Malawi Ltd [1992] 15 MLR 12 (HC)**.

1.5.2 In the present case, the defendant admits to be in possession of the Kenwood Cooker. Their defence is that the continued detention was engendered by the plaintiff when he refused delivery of the same. The plaintiff states that on the 29th day of August 2013 he wrote the defendant demanding the return of the said goods, evidence by a letter marked **AAM1**, but that he got no response from the defendant until sometime in October when the defendant's agent Mr Mazinga brought the Kenwood cooker to his house.

1.5.3 The plaintiff said that he refused the delivery because it was not accompanied by a letter of apology. He was told by Mr Mazinga that the letter would come later but the same did not come.

1.5.4 It is noted therefore that the plaintiff demanded the restoration of the Kenwood Cooker. Mr. Mazinga alleged during testimony that he came back to return the Kenwood Cooker about a week after seizure. This is obviously untrue because according to his own testimony, the seizure was effected on or about 15 August 2013. However, the Plaintiff wrote his letter of demand for the return of the cooker on 29 August 2013. This was already more than a week later. Be that as it may the plaintiff

demanded the restoration of his goods. He refused the delivery because there was no official letter of apology.

1.5.5 Considering the circumstances in which the Kenwood Cooker was seized by the defendant, this Court is of the view that the plaintiff's demand for an official apology to accompany the return of the cooker was not unreasonable. However, such a request is inconsequential for purposes of the tort of detinue. The only requirement is the once a demand for restoration is made, the restoration should follow without unreasonable delay. As mentioned above, the authorities show that where there is no intention on the part of the defendant to keep the plaintiff's goods in defiance of the plaintiff's rights, the detention will not be wrongful. See **Air Charters Ltd v Air Malawi Ltd [1992] 15 MLR 12 (HC)**.

1.5.6 In the instant case, upon realising that the goods had been seized and detained in error, they made a physical attempt to restorer the Kenwood Cooker in accordance with the Plaintiff's demands. The Plaintiff refused to take delivery demanding an apology first. Now, as already discussed above, whilst such an apology was perhaps a reasonable demand, it is not relevant for purposes of establishing the existing or non-existing og the tort of detinue in a particular case. What is necessary is to show that there was a demand to restore and that the defendant refused to restore. In the instant case, there was a demand to restore and the defendant made a physical attempt to restore. The Plaintiff refused the restoration, demanding an apology first. This all happened before the present proceedings were instituted. In the circumstances, there was no detinue in point of law. That head of claim therefore must fail.

1.6 Shock, distress and injury to feeling

1.6.1 According to the testimony of Chimwemwe Lisimba. On the material day, the defendant agent seized the plaintiff's property in full view of the neighbours, and he did so violently, shouting and was generally rude. This was not challenged during cross-examination; and neither did DW1 in his testimony refute the allegation that he was shouting around during the seizure. It should be noted however that on that day the plaintiff was in Republic of South Africa. He did not directly witness the fracas. Secondly, it appears that the shouting was actually mutual. PW2 stated in her own evidence that "we were quarrelling." It would appear here therefore that both parties were quarrelling at the Plaintiff's premises. This obviously must have been an unseemly scene.

1.6.2 The Court however must ask itself what constitutes "shock", which in the circumstances must mean mental or nervous shock. According to the English case of ***Alcock v Chief Constable of South Yorkshire Police*** [1992] 1 AC 310, for damages to be recoverable, the shock must be a

"sudden" and not a "gradual" assault on the claimant's nervous system. So, for instance, a claimant who develops a depression from living with a relative debilitated by the accident will not be able to recover damages. What this signals is that save in clear and exceptional circumstances, it will be difficult for a plaintiff to recover damages based on shock if he or she did not actually witness the event.

1.6.3 Whilst I am not satisfied on a balance of probabilities that this caused shock requiring compensation in the sense of the law, I certainly hold the view that he suffered humiliation, distress and injury to feeling. However, it would appear to me that the defendant was not, in the totality of the circumstances, the cause of such humiliation, distress and injury to feeling. Such humiliation, distress and injury to feeling could not have been caused but for PW2 whom, the evidence shows, was actually working in concert with the Plaintiff. The Plaintiff brought this to himself through PW2.

1.6.4 In the premises therefore, I find that the claim for shock, distress and injury to feeling has not been made out. This claim must also fail.

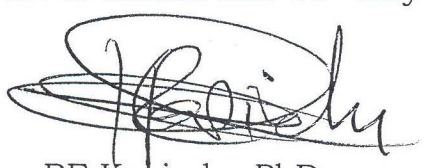
ORDER

1.7 In the premises therefore, I find that the claim for shock, distress and injury to feeling has not been made out. This claim must also fail.

1.8 The above analysis shows that the Plaintiff has failed on all heads of claim. The action has therefore failed in its entirety. It is dismissed with costs to the defendant.

1.9 I order that the Defendant should immediately return the Kenwood Cooker to the Plaintiff. I however exercise my equitable discretion to direct that the plaintiff should not be charged storage charges for the period during which the defendant has kept the plaintiff's kenwood cooker since the plaintiff's refusal to take delivery thereof upon its return by the defendant in October 2013.

Made in Open Court at Zomba this 10th Day of April 2017



RE Kapindu, PhD
JUDGE