



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 2136 OF 2009

BETWEEN

LASTON DAIMONI NTAMBALIKA

PLAINTIFF

AND

GERALD NKUNIKA

DEFENDANT

CORAM: JUSTICE M.A. TEMBO

J. Alide and N. Alide, Counsel for the Plaintiff
Masumbu, Counsel for the Defendant (absent)
Mankhambera, official court clerk

JUDGMENT

1. This is the decision of this Court following a hearing of the originating summons that was heard by my brother Judge in February 2010 but he died a few years after the hearing without writing and rendering his decision. When the presiding Judge died the matter was reassigned to another Judge to write and render the decision. That new Judge did not write and render the decision. Eventually, this matter was then re-assigned to this Court. This Court will reserve its comments on the foregoing, evidently unsatisfactory, sequence of events and simply renders the decision.
2. The uncontested facts in this matter which was commenced by originating summons are straightforward. On 20th August 1993, the plaintiff was offered a lease over plot number 163 within Balaka Township by the Malawi Government Ministry responsible for land. The plot spans 0.5186 of a hectare.

The plaintiff was offered the lease following his application for the said lease. He accepted the offer and paid the relevant fees in the sum of K753.00.

3. A lease was then entered into on 5th February, 2008, effective from 31st August, 2003 for a term of 99 years.
4. The defendant then started to build a house on a plot adjacent to the plaintiff's plot along the boundary that has beacon numbers M30 and M29 as shown on the deed plan that he exhibited. In the course of building, the defendant encroached on the boundary and his house covered beacons number M29. Further, the defendant built a wall right on the plaintiff's plot from the edge of his building towards beacon M10.
5. The matter was brought to the Balaka Town Assembly but there was no satisfactory resolution.
6. At the time of the hearing, the defendant had continued to cut down trees on the plaintiff's plot and by then 42 trees had been felled on the plaintiff's plot. The defendant had not heeded the plaintiff's call to desist from this conduct.
7. In view of the foregoing, the plaintiff seeks several declarations, namely,
 - a) A declaration that the plaintiff is the titleholder of 0.5186 of a hectare of leasehold land known as plot number 163 within Balaka Township.
 - b) A declaration that the defendant is a trespasser on the plaintiff's land known as plot number 163 within Balaka Township.
 - c) A mandatory injunction ordering the defendant to demolish a brick wall erected on the plaintiff's land known as plot number 163 within Balaka Township.
 - d) An injunction restraining the defendant from encroaching on the plaintiff's plot herein.
 - e) An order that the defendant pays general damages for the trespass herein.
 - f) An order that the defendant pays special damages to the plaintiff for the 42 trees felled by the defendant.
 - g) Costs of this action.
8. The plaintiff correctly submitted that trespass to land is regarded as an intentional tort, but that somewhat paradoxically, it can be committed innocently. And that this is because the intention refers to the voluntariness of

the defendant's act in entering the plaintiff's land, not his intention to trespass. And that therefore deliberate entry as happened in this matter is sufficient. See *Conway v George Wimprey & Co. Limited* (1951) 2 KB 266, 273.

9. The plaintiff further submitted that trespass is actionable per se, that is, whether the plaintiff has suffered damage or not. See *Entick v Carrington* (1765) 2 Wills KB 275, 291. He added that a plaintiff in an action for trespass may seek damages or an injunction or both. See *Armstrong v Sheppard & Shot Limited* [1959] 2 QB 384.
10. The plaintiff then indicated the applicable principles on the granting of an injunction and stated that a mandatory injunction must be expressed in such a form that, except in very exceptional circumstances, the person against whom it is granted knows exactly in fact what he has to do. See *Redland Bricks Limited v Morris* [1970] AC 652.
11. This Court is satisfied that indeed, as submitted by the plaintiff, the defendant trespassed onto the plaintiff's land as per the uncontested evidence. There is a very strong case for the plaintiff showing that the defendant will persist in his civil wrong of trespass and infringe on the rights of the plaintiff unless restrained by an order of this Court.
12. It is also very clear that the plaintiff is entitled to the damages that he sought before this Court for the trespass and also for the loss of his trees.
13. In the premises, this Court grants the declarations sought by the plaintiff. Damages shall be assessed by the Registrar. Costs are also for the plaintiff.

Made in open court at Blantyre this 27th August 2020.

M.A. Tembo
JUDGE