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The Judiciary

**IN THE HIGH COURT OF MALAWI**

**CIVIL DIVISION**

**PRINCIPAL REGISTRY**

**CIVIL CAUSE NUMBER 186 OF 2015**

**Between**

**CHRISTINE MUNGOMO .....CLAIMANT**

**-and-**

**MALAWI HOUSING CORPORATION .....DEFENDANT**

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**CORAM: A.J. Banda, Assistant Registrar**

J.S. Banda, for the Claimant

B. Matumbi, for the Defendants

F. Makhambera, Clerk/ Official Interpreter

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**ORDER ON ASSESSMENT OF DAMAGES**

**Background**

By the Judgment of the Court, Malawi Housing Corporation (MHC, the defendant) was ordered to pay Christine Mungomo (the Claimant) the following:

- a. The sum of K179, 481.00 being development charges paid by the claimant to the defendant;
- b. The sum of K10,000.00 being rentals paid by the claimant to the defendant;
- c. Compound interest on the sums of K179, 481.00 and K10,000.00 calculated at National Bank of Malawi lending rate from the dates the said sums were paid by the claimant to the defendant to the date of this Judgment.
- d. Damages for breach of contract to be assessed by the Registrar on a date to be appointed by the Registrar; and
- e. Costs of the action.

I heard the two parties for the purposes of assessment of the interest and damages to be paid.

### **Evidence**

The claimant had three witnesses including herself. In her testimony, Christine Mungomo told the court that she applied for a residential plot of land at Area 6 in the city of Lilongwe. The defendant offered her a plot identified as Number 6/140 at Area 6 as per her request. She paid development charges worth K179, 481.00. A further sum of K10, 000.00 was also paid. She said later, the defendant wrote her, to advise that her lease had been registered. It was the claimant's evidence that in the year 2000, she tried to develop the plot of land but she could not because there were no beacons. She tried to have that issue rectified by MHC but to no avail.

The claimant stated that she later discovered that the plot was registered in the name of Kennerson Alexander Kamuyambeni. She also discovered that MHC had filed a Statutory Declaration under section 51 of the Registered Land Act, without having notified her of the intention to forfeit her lease. Further, she said, despite all that the defendant kept on taking in money from her in form of ground rentals.

It was her evidence that the defendant told her that her file was missing and that they would pay her back money plus interest thereon but this promise was never kept. She said that as a result of the unlawful forfeiture of the lease by the defendant she has suffered a lot of inconvenience, huge loss and damage.

The claimant said that when the Honourable Justice Tembo ordered the defendant to pay back money she paid with compound interest thereon calculated at the National Bank of Malawi plc bank lending rate, she engaged Innocent Katengeza, an accountant by profession to help her calculate the interest payable on the sums. She said that she also engaged Edith Maseya, a land valuer by profession to value the land in issue as an expert in that area.

The 2<sup>nd</sup> witness for the claimant was Edith Febronia Maseya who told the court that she was a registered land valuer, estate agent and auctioneer with the Land Economy Board. She said that she had expertise in land administration, land management, resettlement, property valuation, property management, natural resources and environmental management, housing management and project management. She said that she held a Master of Science (International

Land Management) from the University of East London, UK (2000). She also said that she also held a Bachelor of Science (Honours) Land management from the University of East London, UK (1993).

She said that she had been engaged by the claimant to assist her and the court in valuing property title number Bwaila 6/140. She said that she visited the particular property and in her opinion the property had a value of MK35, 000,000.00 (Thirty-Five Million Kwacha).

In cross examination, she said that she that she had ever sold a plot of land in Area 6, Lilongwe for K20, 000,000.00. She said the current market value of the area would be K35, 000,000.00. She said that her valuation process had recourse to the prices used by the Lands Department, the defendant and other private sellers and buyers. She said that she used fair open market price which reflects the value of the land. She highlighted the conditions under which the valuation was made. She said there were other developed properties in the area which could be similar in size but she did not have the occasion to measure their exact size.

The last witness of the claimant was Innocent Katengeza. He told the court that he was a senior lecturer in Accounting and Finance at the Malawi College of Accountancy, Lilongwe campus. He said that he had 16 years-experience in working in accounting and finance. He said that he had a Bachelor of Science in Applied Accounting from Oxford-Brookes University; Fellow of the Association of Chartered Certified Accountants (FCCA) and Certified Public Accountant with the Institute of Chartered Accountants of Malawi.

It was his evidence that he was engaged by the Claimant to assist her and the Court in compounding interest as ordered by the Court. He said that he was familiar with the facts of this matter on account of his engagement. He said that Justice Tembo had delivered a judgment that the Defendant should pay the Claimant sums of K179, 481.00 and K10,000.00 plus compound interest thereon calculated at the commercial lending rate used by National Bank of Malawi plc from May, 2010 to the date of Judgment.

Innocent Katengeza went further to state that he obtained a schedule of the interest rates applicable over the period in issue. He produced and tendered the schedule marked 'IK 1'. From that schedule, this witness further said, he computed interest as ordered by the Court on the said sums. He produced a copy of the calculations sheet and tendered it, marked "IK 2". He said that the interest accrued up to K246, 041,702.33.

In cross examination, Innocent Katengeza stated that he had qualified for his ACCA in the year 2007 but he had been working since the year 2003 as a junior auditor at Graham Carr. He further said that the first column in the schedule of interest represented 1 day, as the time period within which the interest was compounded. He said it was a column that would be removed without any changes on the calculations.

The witness further said that interest can be compounded in a period of a year, can be a month, or a week, or a day. He said that it was acceptable to calculate interest per day. He said that the basis was 'what is it that is supposed to be done.' In this case he said that he did calculate interest per day following the Judgment by the Court which he read.

It was Innocent Katengeza's statement that if compounded per annum the rate would be 48%, and that by compounding it per day it increased to 61%.

In re-examination Innocent Katengeza stated that compound interest was over a period of time whilst simple interest is done once to the principal sum. He said that the bank charges compound interest daily on an overdraft facility. He said that the Judgment ordered that compound interest be based on the interest rate of National Bank of Malawi plc, hence his daily compound interest calculation.

The defendant did not file any witness statements despite that it had initially registered two witnesses. On the day the case was next adjourned for hearing, the defendant's counsel informed the Court that it was interested in having the matter reheard before the Judge and that they awaited a date of hearing.

### **The Law and Analysis of Fact**

The burden of proof in civil matters such as this one rests on the one who asserts the affirmative, and the standard of proof is on a balance of probabilities- **Miller v. Minister of Pensions [1947] 2 All ER**. Assessment of damages presupposes that damages have been proved and the business that remains is the measure of the amount of the damages- see the case of **Ngosi t/a Mzumbamzumba Enterprises v. Amosi Transport Co Ltd [1992] 15 MLR 370(HC)**. The rule is that the injured party has provided proof of the damage sustained prior to the assessment hearing- **Yanu Yanu Co v. Ltd v. Mbewe 11 MLR 405 (SCA)**. Damages in a case like this one, are not awarded to punish the defendant, but to fully compensate the claimant of all the

losses that he has suffered as a direct or consequential result of the defendant's wrongful act or omission see- **George Kankhuni v. Shire Buslines Ltd, Civil Case Number 1905 of 2002.**

For monetary losses, compensation takes care of restitution of the monetary value. It is not easy to quantify damages for losses that are not monetary. Courts as such use comparable cases as a guide to the quantification of applicable damages, without losing sight of particularities in the individual case that the court is dealing with. See **Kalinda v. Attorney General [1992] 15 Malawi Law Reports 170 @ 172.** The court will also consider factors such as passage of time since a particular comparable award was made, as well as currency fluctuations within the period between the case at hand and the comparable one- **Hon. Kennedy Kuntenga v. Attorney General, Civil Cause No. 2002 of 2002, High Court, Principal Registry, (unreported).**

In cases where a seller of land breaches the terms of the sale and fails to convey to the buyer, the measure of damages is similar to that in the sale of goods; namely, apart from recovering the price paid, the injured party is entitled to the difference between the current value of the property and the price he paid- being the loss of bargain or lost value- **Lowry Mbulo v. Trust Auctioneers and Estate Agents Civil Cause Number 443 of 2008, Wright v. Dean [148] Ch 686, Suleman v. Shahsavari [1989] 2 ALL ER 460.**

The Courts reckon the current market value of the land by the use of expert evidence on the basis of the valuer's reports and comparable sales in the vicinity- see David Wilby, QC **The Law on Damages**, Butterworths.

In the instant case, at this stage of the proceeding there is no dispute that the Claimant paid the sum of K179, 481.00. As for the market value of the Claimant submitted that the Defendant did not challenge the evidence of the land valuation expert witness Edith Maseya that the value of the land in question has increased to K35, 000,000.00. The Claimant also submitted that the Defendant having internal valuers, was expected to bring them to testify and challenge Mrs. Maseya's valuation. It was the claimant's submission therefore that the Court ought to accept the valuation by the claimant's witness.

I agree with the claimant that the valuation of Edith Maseya is unchallenged. I also agree that the decision not to call own expert witnesses is to be presumed that the witnesses not called would most probably given evidence that is adverse to the Defendant hence not calling them. Otherwise the Defendant's core business is exposes it to experts in valuation. I will thus take the valuation of Edith Maseya as uncontroverted.

Looking at the principles enunciated above, the claimant is entitled to a difference between the said current market value of property and the price she paid for it. The current market value being K35, 000,000.00 and the price that she paid being K179, 481.00, the Claimant is hereby awarded **K34, 820,519.00** as damages under the head of loss of bargain.

### **Interest**

The Order of the Court entitles the claimant to compound interest on the sums paid to the Defendant. The interest is to be calculated at the National Bank of Malawi base lending rate as per that Order.

In commercial matters, the practice of the Court is to award interest at the commercial rate. The commercial rate is the rate at which the plaintiff would borrow money in place of the money which had been wrongly withheld from her by the Defendant. This is usually the minimum lending rate as stipulated by the Central Bank (in case of Malawi, the Reserve Bank of Malawi) plus a markup, usually 4%. See **YMW Properties Company v. Chamwavi Investments Commercial Cause No 166 of 2009**.

This holding shall be in tandem with established law on the point. In the **Lowry Mbulo** matter cited above, His Honour Manda (as he then was) stated:

“It was held in the two cases that the Plaintiff was entitled to damages beyond the return of his deposit with interest... following these decisions, (which I found to be quite persuasive) this court orders that the Plaintiff should get back his deposit of K280,000.00 with interest which will be assessed. This being pre-judgment interest, it must be assessed from the date on which the cause of action arose, which would be on the 8<sup>th</sup> day of January, 2008, the date on which the deposit was paid (see, **Zgambo vs. Kasungu Flue Cured Tobacco Authority** 12 MLR 311). As for the rate, at which interest would have to be assessed, it was noted that the practice of the court in Malawi is to set the rate of assessment of interest at the minimum bank lending rate plus 1%. (see, **Zgambo vs. Kasungu Flue Cured Tobacco Authority**, at page 314)

In this instant matter the Court heard from the financial expert called by the Claimant. His calculation as to interest was K246, 041,702.33. The Defendant did not call their own expert to challenge this evidence. It is my assessment that the calculation of by the expert is in tandem

with the order of the Court. I therefore make an award of **K246,041,702.33** as compound interest.

**Conclusion**

The Claimant is hereby awarded the sum of **K179, 481.00** and **K10,000.00** as already ordered by the Court. She is also awarded **K34,820, 519.00** being the loss of bargain as damages for breach of contract; and the sum of **K246,041,702.33**. The claimant is also awarded costs of assessment.

Made this 20<sup>th</sup> day of October, 2021



**Austin Jesse Banda**

**ASSISTANT REGISTRAR**