



**REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY**

Civil Cause Number 357 of 2013

BETWEEN:

**DOROTHY SAMBANISO JUMBE.....1ST CLAIMANT
LYNN JUMBE KHOLOMANA.....2ND CLAIMANT
MPHATSO EDNA JUMBE.....3RD CLAIMANT**

AND

**CROWN AGRO PROCESSORS LIMITED.....1ST DEFENDANT
ATTORNEY GENERAL.....2ND DEFENDANT**

CORAM: C MANDALA: ASSISTANT REGISTRAR

B Semphani: Counsel for Claimant of Kainja & Dzonzi

M Theu: Counsel for Defendant of Lexon & Lords

C Zude: Court Clerk

ASSESSMENT OF DAMAGES

CM MANDALA, AR:

INTRODUCTION AND BACKGROUND

This is an order for assessment of damages pursuant to a Judgment delivered on 21st June 2019 by Hon. Justice MCC Mkandawire (as he then was). The Claimants successfully proved that they ought to be compensated for: a) loss of crops growing on the land and damaged by the 1st Defendant, b) loss of income for the period that the 1st Defendant unlawfully deprived the 2nd and 3rd Claimant's access to and use of the land, c) consequential damages arising from the 1st Defendant's destruction of the land for agronomical purposes, and d) costs of the action. The hearing on Assessment of Damages was conducted on 31st August 2020.

Between the date of hearing and date of delivery of ruling, 31st August 2020 and 7th May 2021, the court has issued notices of delivery of ruling, but the delivery of ruling has not taken place. This court extends its sincere apologies for the inconvenience caused and the delay in the delivery of the ruling.

EVIDENCE

Both the Claimants and the Defendants paraded witnesses at the locus in quo that was visited on 31st August 2020. The bulk of the evidence was heard at the locus in quo and the premises were surveyed by the court as the evidence was being presented. The evidence will be analyzed below under the various heads.

THE LAW ON ASSESSMENT OF DAMAGES

The High Court in *Ngosi t/a Mzumbamzumba 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 Plaintiff is not disentitled to compensation – *Mkumuka v Mphande* (HC) 7 MLR 425.

The cardinal principle in awarding damages is ‘*restitutio 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 Coal 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 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.*’

The law distinguishes general damages and special damages as follows – general damages are such as the law will presume to be the direct natural or probable consequence of the action complained of. Special damages, on the other hand, are such as the law will not infer from the nature of the course - *Stros Bucks Aktie Bolag v Hutchinson* (1905) AC 515. In determining the natural consequences, the court considers if the loss is one which any other claimant in a like situation will suffer – *McGregor on Damages* p23 para 1-036.

Special damages must be specifically pleaded and must also be strictly proved - *Govati v Manica Freight Services (Mal) Limited* [1993] 16(2) MLR 521 (HC). A Plaintiff who claims special damages must therefore adduce evidence or facts which give satisfactory proof of the actual loss he or she alleges to have incurred. Where documents filed by the Plaintiff fail to meet this strict proof then special damages are not awarded – *Wood Industries Corporation Ltd v Malawi Railways Ltd* [1991] 14 MLR 516.

Although perfect compensation is impossible, what the plaintiff should get is fair and adequate compensation - *British Commission v Gourley* (1956) AC 185. Since it is difficult to assess damages involving monetary loss, courts resort to awarding conventional figures guided by awards made in similar cases and also taking into account the money value. Lord Morris buttresses this contention in *West v Shepherd* (1964) AC 326 at 346 where he states: ‘*money cannot renew a physical frame that has been battered and shattered. All judges and courts can do is to award a sum which must be regarded as giving reasonable compensation.*’

The court bears in mind the sentiments laid out in *Steve Kasambwe v SRK Consulting (BT) Limited* Personal Injury Cause Number 322 of 2014 (unreported): ‘*At times, the court is faced with situations where the comparative cases have been rendered obsolete because of the devaluation of currency and inflation. It would not achieve justice if the court insisted on the same level of award as was obtaining in the previous cases. In such situation, when deciding the new cases, the court must take into account the life index, i.e.*

cost of living and the rate of inflation and the drop-in value of the currency. The court must therefore not necessarily follow the previous awards but award a higher sum than the previous cases.'

COMPENSATION

Loss of Crops

The Judgment of 2019 awarded damages to the Claimants as stated in their pleadings. The first head was couched as follows:

(a) *Compensation for the loss of crops growing on the land and damaged by the 1st Defendant*

The Claimants have made submissions for K45,000,000.00 (forty-five million kwacha) as compensation for loss of chilli crops and projected income for the sale of this chilli, and K27,375,000.00 (twenty seven million three hundred and seventy five thousand kwacha) as compensation for trees and seedlings. The discussion will therefore be divided into two heads: compensation for loss of chilli crops and projected income; and compensation for trees and seedlings.

- *Loss of Chilli Crops and Projected Income*

Mphatso Edna Jumbe testified for the Claimants. The pertinent parts of her witness statement are set out below.

- (v) *I repeat what was stated in the Statement of Claim that in or about 2008, I and the 2nd Claimant decided to into commercial chilli farming at the land in question. We arrived at the decision of growing chillies because we had a direct market to Nali factories. We were privileged to get firsthand support in growing and managing the chilli as the 2nd Claimant is married into the Khoromana family, the owners of the Nali company.*
- (vi) *In the 2008-2009 growing season, we planted 1 acre of chillies to test the idea and based on the good produce, we increased the acreage to 3 in the 2009-2010 growing season stretching from the main road up to the foot path which passed through the land from the direction of Mr khaiya's land to the road going towards Likudzi.*
- (vii) *Owing to the fact that chillies are perennial crops with a productive life span of 2 years, our plan was to keep increasing the acreage by 3 acres every year for the next 5 years which meant that by 2015, we would have had 15 acres of chilli crop.*
- (viii) *Chilli production is at its highest in the second year of production, yielding roughly 1500kg per acre under normal fair management and 2500kg per acre under capital intensive and good management. We had therefore planned to implement an investment plan which would allow us to use the proceeds of one year to invest in the expansion of the acreage until we achieved the intended 15 acres. This means that we expected the annual expansion and yields set in the table below over the next ten years from 2009. See Table 1 below which summarises the expansion plan.*

Table 1: Overall Business Plan

<i>Year</i>	<i>Acreage</i>	<i>Hectares</i>	<i>Yield Per (Hectare)</i>	<i>Total Estimated Yield (Kg)</i>
<i>2008-2009</i>	<i>3</i>	<i>1.21</i>	<i>1000</i>	<i>1210</i>
<i>2009-2010</i>	<i>6</i>	<i>2.42</i>	<i>1500</i>	<i>3630</i>

2010-2011	9	3.64	1500	5460
2011-2012	12	4.85	1500	7275
2012-2013	15	6.07	1500	9105
2013-2014	15	6.07	1500	9105
2014-2015	15	6.07	1500	9105
2015-2016	15	6.07	1500	9105
2016-2017	15	6.07	1500	9105
2017-2018	15	6.07	1500	9105
2018-2019	15	6.07	1500	9105

- (ix) I refer the court to paragraph 7.4 above as read with Table 1, particularly the fourth and fifth columns wherein I have put the estimated yield of the chilli per hectare and state that the estimated
- (x) In the 2009-2010 growing season, we spent about MK500,000 on clearing the land, planting and looking after the chillies. Our projection was that our costs would be increasing annually at the estimated rate of MK500,000 for the next 5 years owing to the expansion and would start reducing from that point onwards as there would be no more land clearing. See Table 2 below on the projected costs for the 10 year period.
- (xi) I refer to paragraph 7.6 above, and repeat that since our plan was to keep expanding the farm at the rate of 3 acres a year at the estimated cost of MK500,000, it meant that for the first 5 years our investment would increase by MK500,000 annually as shown in Table 2 below. However, once the 15 acres had been achieved, we anticipated our costs to stabilize and increase at a steady rate of about 5% annually as shown from the growing season 2013-2014 onwards.

Table 2: Overall Investment Plan

YEAR	ANNUAL COST (MK)
2009-2010	500,000
2010-2011	1,000,000
2011-2012	1,500,000
2012-2013	2,000,000
2013-2014	2,625,000
2014-2015	2,756,250
2015-2016	2,894,000
2016-2017	3,038,700
2017-2018	3,190,635

2018-2019	3,350,000
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- (xii) *Again, I refer the Court to table 3 below and state that in arriving at the proposed prices for chillies per kilogram have been based on prevailing open market prices for different years in question and I have used an average of the same in column 7 of the Table which have been used for purposes of calculating the annual estimated incomes from the chilli crops.*
- (xiii) *Based on the estimated annual yields and cost of production above and the prevailing market rates for chillies over the years, the Court will note from Table 3, particularly in column 9 above we would have made the estimated profits of **MK50,909,300** shown in Table 3 above.*
- (xiv) *I am aware that in real life business projections rarely come true because there are usually other intervening events which may increase or reduce the business profitability such as good or bad weather or indeed market fluctuations. In view of the above, it would be reasonable for the Court to reduce the projected profits by 10% which would give the final figure of **MK45,000,000**.*

In response, the Defendants aver that the 3rd Claimant was evasive during cross examination and did not proffer any substantive evidence to prove that there had indeed been a chilli business. Counsel for the 1st Defendant avers that there are no supporting documents for tabulated projections made by the Claimants and that commercial farming activities had not been proven.

The Claimants paraded an additional witness under this head named Chiyembekezo Bezala. The pertinent part of his evidence was that he was employed in 2007 I by the 2nd Claimant, Mrs Kholomana . Mr Bezala was advised that the 2nd Claimant wanted to start growing chillies for sale in Limbe at Nali Limited. The land was cleared to plant chillies in the month of July of that year and we sowed the chillies on a nursery so that we could then plant in the garden. In the second year of Bezala’s employment the chillies were harvested ferried to Limbe by a three-tonner lorry two times for sale at Nali Limited. In cross examination, Bezala told the court that the chilli was planted on about 3 acres of the land. The area where the chilli was planted had natural trees before the chilli farming started, the trees were cut down and the land was cleared in order to plant the chillis. The Claimants fourth witness was Mzondeni Mponda who confirmed that there was a chilli farm and that the chilli farm ended where the lot of bluegum trees started.

The Defendants second witness, George Leonard Nthachi, disputed that there was evidence that Chilli was ever grown on the land. According to this witness, there would have been ridges where the chilli was purported to have been grown and there were none when this witness inspected the land. The Defendants contention that ridges would have been visible might have held true if so much time hadn’t passed since then. The Claimants started growing chilli in 2007 and 13 years had elapsed between then and the date of hearing. The ridges had probably been washed away by the elements.

It is clear from the evidence that the Claimants were growing chilli for sale. They harvested some chilli in 2008 and it was taken to Limbe for sale. The Claimants propose that the sum of K45,000,000.00 be awarded to them as compensation for the loss of chilli crops and projected income. While, this is fair, this court believes the sum should be discounted by one third to consider factors outside the Claimants’ control that could affect their production such as poor weather conditions, and poor market prices.

This Court therefore awards the sum of K30,000,000.00 (thirty million kwacha) as damages for loss of chilli crops and projected income.

- *Loss of Trees and Seedlings*

The Claimants testified that at the time the land was snatched there were 3 acres of chilli crop, 500 blue gum trees, 4000 gresidiah trees, 150 acacia trees, 1500 gmelina trees, and 400 gmelina seeds. The Claimant's estimated the total cost of their loss and pegged the amount at MK27,375,000.00.

All the witnesses paraded by the Claimants confirmed that there were both natural and transplanted trees on the land. Some of the trees were destroyed by the Defendant while others were still on the premises when the Court sat. The Defendants witnesses averred that the trees that had been lost by the Claimants had already been cut down by the time the 1st Defendant occupied the land. The Defendant's first witness, an employee of the 1st Defendant, told the court that the new trees were planted as a windbreak for the 1st Defendant's chickens.

Considering a totality of the evidence, the Court awards the Claimant K10,000,000.00 (ten million for the loss of trees and seedlings).

Based on the foregoing discussion, **this court awards the total sum of K40,00,000.00 as damages for loss of crops.**

Loss of Income for Deprivation of Access to and Use of the Land

The second head was couched as follows:

- (b) *Loss of income for the period the 1st Defendant has unlawfully deprived the 2nd and 3rd Claimants access to and use of the said land.*

General damages by their nature are incapable of arithmetic calculation and as a result the court exercises its discretion in awarding them since such damage is known to be likely. The defendant needs no notice of it and there is no need to plead it specifically – *Tsamwa v Imprea Inc Fortunato SPA* Civil Cause Number 370 of 1998 and *OC Yiannakis v Adamson Dumba, Registered Trustees of Kaphuka Private Secondary School and Nico General Insurance Company Limited* Civil Cause Number 1680 of 2003.

In the case of *Chinema v World Vision International* Civil Cause Number 1097 of 1991 the Judge noted: “*It is conceded that the Courts are rather conservative in awarding damages for loss of use and the cases do not show a criterion for awarding damages for loss of use... I have pointed out that awards for loss of use are not consistent and they depend on the circumstances of each case and the money depreciates in value all the time.*”

In determining natural consequences, the court considers if the loss is one which any other claimant in a like situation will suffer, see **Mcgregor on Damages** at page 23 para 1036. The compensatory principle is further qualified by other factors such as the principle of remoteness of damage and the duty on the part of the plaintiff to take the reasonable steps to mitigate the loss; see *OC Yiannakis v Adamson Dumba, Registered Trustees of Kaphuka Private Secondary School and Nico General Insurance Company Limited* Civil Cause Number 1680 of 2003.

In the present case, the Claimants have been deprived access to, and use of their land for a period of 11 years, from 2010 to date. The Claimant submitted that, based on their projections, they ought to be awarded the sum of K69, 338,345.85 as compensation for loss of use of land while the Defendants counter argued that the sum of K2,953,337.34 would be adequate. In considering the time period for which the Claimants have been unable to use their land or to access it, by some arbitrary acts of the Defendants, surely K2,953,337.34 would neither

be adequate nor fair compensation under this head. On the other hand, the court also believes that the sum of K69,338,345.85 is on the higher side.

Being guided by the authorities cited, this Court believes general damages can be awarded and will thus award the **sum K15,000,000.00 (fifteen million kwacha) as damages for deprivation of access to and use of the land.**

The Judge nullified the lease that was granted to the 1st Defendant because it was issued erroneously. This court therefore directs that this specific sum ought to be borne by the 2nd Defendant who will pay damages to the Claimants for erroneous issuance of the lease.

Consequential Damages for Destruction of Land for Agronomical Purposes

The final head for damages was couched as follows:

- (c) *Consequential damages arising from the 1st Defendant's destruction of the land for agronomical purposes from the date of occupation up to the date the 1st Defendant shall yield vacant possession of the land.*

Under this head, the Court awards the Claimant the sum of K1,000,000.00 (one million kwacha) for every year that the Claimants have not had access to their land for agronomical purposes. This sum will continue to accrue until the 1st Defendant hands possession over to the Claimants. Thus far, the 1st Defendant ought to compensate the Claimants with the sum of K10,000,000.00 (twenty million kwacha) accruing from 2010 to date.

Based on the foregoing discussion, **this court awards the sum of K10,000,000.00 as damages for consequential damages (thus far).**

DISPOSAL

The Claimant is therefore awarded K40,000,000.00 for loss of crops (to be borne by the 1st Defendant); K15,000,000.00 for unlawful deprivation of land (to be borne by the 2nd Defendant); K10,000,000.00 for consequential damages (to be borne by the 1st Defendant), and costs of the action (to be taxed by the court). **The Claimant's total award is K65,000,000.00 (sixty-five million kwacha).**

Leave to appeal is granted. Each party is at liberty to appeal to the Supreme Court of Appeal within the requisite time frames.

Ordered in Chambers on the 7th day of May 2021 at the High Court, Civil Division, Lilongwe.



C Mandala

ASSISTANT REGISTRAR