

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2017/HP/1552



B E T W E E N:

PAUL CHITENGI

PLAINTIFF

AND

ATTORNEY GENERAL
JANE CHITEMBWE
STANDWELL LUNGU

**1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT**

**Before Honourable Mrs. Justice M. Mapani-Kawimbe on the 25th day of
July, 2018**

For the Plaintiff : Mr. R. Hatongo and Mr. P. Chulu, Messrs
Shepande and Company
For the 1st Defendant : Mr. E. Tembo, Assistant Senior State Advocate

J U D G M E N T

Cases Referred To:

1. *Christopher Lubasi Mundia v Sentor Motors Limited* (1982) ZR 66
2. *Newspapers Limited v Kapwepwe* (1973) Z.R 292
3. *Bolag v Hatchison* (1905) A.C. 55
4. *Attorney General v Mpundu* (1984) Z.R 6 (S.C)
5. *The Attorney General v Katwishi Kapandula* (1988-1989) Z.R 69 (S.C)

Other Works Referred To:

1. *Winfield and Jolowicz on Tort*, 19th Edition by W.E Peel & J. Goudkamp,
Sweet & Maxwell London, 2014
2. *McGregor on Damages*, 18th Edition, (Thomson Reuters (Legal) Limited
2009

The Plaintiff issued a Writ of Summons and Statement of Claim endorsed with claims for:

- (i) *A declaration that the Plaintiff is the registered owner of Lot LN-3202/23.*
- (ii) *An order restraining the Zambia Police or their agents from any form of interference on the Plaintiff's Lot LN- 3202/23.*
- (iii) *K5,000,000.00 for damages caused to the Plaintiff's property.*
- (iv) *K2,543,500.00 special damages for loss of business and profits.*
- (v) *K5,000,000.00 Exemplary damages for maliciously and wantonly destroying the Plaintiff's land.*
- (vi) *Damages for anguish, mental torture and distress.*
- (vii) *Costs for and incidental to this action.*
- (viii) *Any other relief the Court may deem fit.*

The Defendants did not respond to the Plaintiff's claims by way of Memorandum of Appearance and Defence. The facts as they are revealed in the pleadings were that the Ministry of Lands offered farm L/10773/M, Kafue to the Plaintiff's late father, Honourable Justice Peter Chitengi in 1998 when the Plaintiff's father passed away sometime in June 2010, he acquired interest in the farm.

In 2012, the Plaintiff began to carry out farming activities and grew maize, groundnuts and Acacia seedlings on the farm until sometime in 2013 when Zambia Police officers without title invaded his farm and attempted to evict him. The Plaintiff approached the

Commissioner of Lands who resolved the matter in his favour and offered the Zambia Police officers an alternative track of land adjacent to his farm. As a result, the Plaintiff's farm L/10773/M was subdivided and renumbered L/3202/23. It was reduced from 10 to 3.1794 hectares.

Between January and February, 2016, the 2nd and 3rd Defendants instructed police officers to enter the Plaintiff's farm without his permission. They destroyed his perimeter fence, cut down the Acacia seedlings and crops. They also dug trenches on the gazetted road leading to the Plaintiff farm to deny him access. In consequence, the Plaintiff suffered loss and was deprived of the expected profits from his investment. He was humiliated and suffered great mental anguish. The Plaintiff pleaded the following special damages:

- (i) *The Plaintiff is in the business of commercial farming. He grows maize, groundnuts and acacia trees and sales at a profit.*
- (ii) *The Plaintiff makes a 100% profit on the cost of the produce. When the Defendants trespassed on the Plaintiff's farm, they destroyed the Plaintiff's crops worth K2,543,500.00*
- (iii) *If not for the Defendants' trespass, the Plaintiff would have made profits of about K2,543,500.00. The Defendant's contumelious actions caused the Plaintiff to lose profits and potential business.*

The Plaintiff claimed exemplary damages as follows:

- (i) The Defendants are civil servants who are in charge of maintaining peace and order.*
- (ii) Even if they claim ownership to the Plaintiff's farm, they do not have proper documents of title. Further, they trespassed on the Plaintiff's farm and maliciously destroyed his crops.*
- (iii) The Defendants actions as police officers were unlawful, oppressive, arbitrary and exhibited total disregard for the Plaintiff's rights.*

The matter came up for trial on 19th June, 2018. The 1st Defendant was represented in Court while the 2nd and 3rd Defendants did not appear for trial, even after notice was served on them according to the Affidavit of Service filed on 19th June, 2018. I proceeded with trial under Order 35 Rule 3 of the High Court Rules, which says that a Court can hear a matter where a Defendant has been served with notice and there is Affidavit evidence to prove service.

The Plaintiff called two witnesses, the first of which was **Paul Mukonda Chitengi** who testified as **PW1**. His evidence was that he was the owner of farm L3202/23 in Shimabala area, Kafue. The farm was initially allocated to his deceased father and he applied to

transfer title into his name in 2012. The Commissioner of Lands gave his consent and on 31st March, 2016, he was given title and the farm was re-planned and reduced in size.

PW1 testified that he engaged in commercial farming activities, which included the growing of maize and fields for maize, bean, groundnut and Acacia seedlings. His main clients were non-governmental organizations that supported women empowerment. The Defendants forcibly invaded his farm and dug trenches on the gazette road leading to his property, which he built at his own cost. They further prevented him from building a piggery and poultry after he had borrowed K100,000 from PAN African Building Society and K200,0000 from Barclays Bank.

PW1 further testified that he did not benefit from the loans, which he had to pay for because of the Defendant's actions. While he paid off the PAN African Building Society loan, he was still indebted to Barclays Bank. According to PW, he expected a profit of ZMW2,500,000 from his investments and a further profit of K500,000 from his Acacia tree seedlings. He referred the Court to page 10 of his Bundle of Documents, which showed pictures of his

active fields. PW1 also testified that he spent K100,000 on labour, materials and transport in constructing his perimeter fence. It was razed down at the instruction of the 2nd and 3rd Defendants and his money went to waste. In concluding his testimony, he prayed to Court to grant him the reliefs sought and costs.

The witness was not **cross-examined**.

The second Plaintiff witness was **Rabson Mwale** who testified as **PW2**. He told the Court that PW1 employed him in 2012 and he was responsible for planting Acacia trees, beans, maize, sweet potatoes and groundnut seedlings. It was his evidence that police officers invaded PW1's farm in 2012 and claimed that they owned the land. They used an excavator to remove crops in the fields and razed down the perimeter fence. All the plants in the fields were destroyed together with a number of tree seedlings. The police officers continued to trespass on PW1's farm and threatened to evict them by force. PW1 failed to build a poultry and piggery because of the intimidation.

The witness was not **cross-examined**.

Learned Counsel for the Plaintiff filed written submissions for which I am indebted. He submitted that the Plaintiff owned farm L3202/23 in Shimabala area, Kafue and had title to prove ownership. According to PW1 and PW2, the Defendants trespassed on PW1's farm and destroyed his crops and fencing.

Counsel further submitted that in actions for trespass, damages were actionable *per se*. However, in this case, the Plaintiff claimed special damages in accordance with the principles set out in the case of **Christopher Lubasi Mundia v Sentor Motors Limited**¹. Counsel further submitted that PW1 borrowed K750,000 to invest in a piggery and poultry project, which did not materialise. If the investment had gone ahead, PW1 would have made a profit of about K2,500,000. PW1 also lost K500,000 in expected profits from the Acacia tree seedlings because they were destroyed.

Counsel cited the case of **Times Newspapers Limited v Kapwepwe**², on exemplary damages where the Supreme Court held that:

“The law in Zambia relating to exemplary damages should be the law as it was understood in England before *Rookes v Bamard*, that exemplary damages may be awarded in any case where the Defendant has acted in contumelious disregard of the Plaintiff’s rights.”

Counsel went on to state that PW1 was entitled to exemplary damages because the 2nd and 3rd Defendants who are law enforcement agents acted maliciously and in contumelious disregard of the Plaintiff’s rights when they invaded his farm.

As I begin determination of this case, I wish to state that I have seriously considered the pleadings, evidence record adduced and the submissions filed herein. The facts of this case have not been disputed and can be briefly described thus: the Plaintiff’s deceased father was allocated farm L/10773/M, Kafue in Shimabala area in 1998. Title transferred to the Plaintiff on 31st March, 2016 when the Commissioner of Lands issued Certificate of Title No. 1999.

The Plaintiff’s father’s original farm was re-planned because a dispute arose between the Plaintiff and Zambia Police Service officers. The land was reduced in size from 10 to 3.1794 hectares and the Zambia Police officers were given land adjacent to the

Plaintiff's farm by the Commissioner of Lands. In 2012, the Plaintiff embarked on commercial farming activities and grew maize, various seedlings including Acacia trees and he expected a profit of K500,000 from the Acacia tree seedlings. He also borrowed money from two financial institutions that is PAN African Bank and Barclays Bank all valued at K300,000 to build a poultry and a piggery, which would have given him a profit of K2,500,000.

The Plaintiff's plans were sent into disarray when the 2nd and 3rd Defendants instructed police officers to invade his farm. They excavated the plants in the active fields and intimidated the Plaintiff and his workers. As a result, he was unable to build the piggery and the poultry. The police officers also razed down the Plaintiff's perimeter fence and dug trenches on the gazette road leading to his farm in a bid to prevent him access. All the while, the police officers had no title to the Plaintiff's farm.

On the basis of the foregoing, I find that the issues that fall for determination are:

- i) *Whether the Defendants trespassed on the Plaintiff's land?*
- ii) *Whether the Plaintiff is entitled to the reliefs sought?*

i) ***Whether the Defendants trespassed on the Plaintiff's land?***

It is trite law that a certificate of title serves as conclusive evidence of ownership of land. Sections 33 of the Lands and Deeds Registry provides that:

“33. A Certificate of Title shall be conclusive as from the date of its issue and upon and after the issue thereof, notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the President or otherwise, which but for Parts III to VII might be held to be paramount or to have priority: the Registered Proprietor of the land comprised in such Certificate shall except in case of fraud, hold the same subject only to such encumbrances, liens, estates or interests as may be shown by such Certificate of Title and any encumbrances, liens, estates or interests created after the issue of such certificate as may be notified on the folium of the Register relating to such land but absolutely free from all other encumbrances, liens, estates or interests whatsoever.”

Under section 34 of the Act, a certificate of title can be cancelled where there is proof that it was obtained fraudulently. From the evidence on record, I find that the Plaintiff was issued certificate of title for farm L/3202/23 in Shimabala area in Kafue by the Commissioner of Lands. In accordance with section 33 of the Lands and Deeds Registry Act, the certificate of title proved that the Plaintiff is the owner of his farm and has superior claim to it.

According to learned Authors **Winfield and Jolowicz on Tort** by W. E. Peel & J. Goudkamp, 19th Edition, at page 427, paragraph 14-001:

“Trespass to land is the name given to that form of trespass, which is constituted by unjustifiable interference with the possession of land.”

According to that authority, anyone who unjustifiably interferes with a person's enjoyment of land commits trespass. According to the evidence on record, PW1 testified that he never invited the Defendants on his land. I therefore, find that by unjustifiably invading PW1's farm, the Defendants committed trespass. They had no right to unlawfully excavate PW1's crops from the fields nor to raze his perimeter fence. In any event, they did not possess title to the property. Thus, I find that their trespass is actionable *per se*.

ii) Whether the Plaintiff is entitled to the reliefs sought?

At page 428 paragraph 14-003 the Learned Authors on **Winfield and Jolowicz on Tort** state that:

“Trespass is actionable *per se* i.e whether or not the claimant has suffered any damage. The rule may seem harsh but in earlier times,

The Learned Author McGregor on Damages 18th Edition, at paragraph 1-029 at page 20 states:

“In the cases of damages, damages are often said to be “general” or “special” and these two terms are usually contrasted with each other, yet the terms are used in a variety of different meanings are not kept separate, the indiscriminate use of the terms only spells confusion. Such a separation is not seen very often, and it is therefore wise to elucidate these terms at the very start.”

In the case of **Bolag v Hatchison**⁸, it was stated that:

“General damages.... Are such as the law will presume to be 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 act. They do not follow in ordinary course. They are exceptional in their character, and therefore, they must be claimed specially and proved strictly.”

In the case of **Attorney General v Mpundu**⁹, the Supreme Court held that:

“It is trite law that if the Plaintiff has suffered damage of a kind which is not necessary and immediate consequence of a wrongful act, he must warn the Defendant in the pleadings that the compensation claimed could extend to this damage, thereby showing the Defendant the case he has to meet, and assisting him in computing a payment into Court. The obligation to particularise his claims arises not so much because the nature of the loss is necessarily unusual, but because a Plaintiff who had the advantage of being able to base his claim upon a precise calculation must give the Defendant access to the facts, which makes such calculation possible. Consequently, a mere statement that the Plaintiff claims “damages” is not sufficient to let in evidence of a particular loss which is not a necessary consequence of the wrongful act and of which the Defendant is entitled to a warning.”

The authorities cited above all expound that where a claim of general, special or exemplary damages is made, it must be proved at trial by evidence that the loss incurred was as a direct result of the Defendant's conduct; or that the loss was as a result of a natural or probable consequence of the Defendant's actions. A mere expectation or apprehension of loss is not sufficient and damages should not be recovered when such facts are disclaimed. Further, a claim for special damages must be accompanied by either documentary or independent evidence to support the same.

From the facts of this case, I find that the Plaintiff has merely made statements of claims for special damages. He did not produce evidence in Court to substantiate the particular loss that he suffered so that the Court could be assisted in making a finding. I further find that the Plaintiff failed to adduce evidence of loss in terms of the loans that he obtained from the financial institutions. Accordingly the claims fail.

There is no dispute that the Defendants trespassed on the Plaintiff's property and caused damage to his crops, perimeter fence and the gazetted road leading to his property. On the basis of those

facts, I find that the Plaintiff is entitled to general damages because he suffered loss as a direct result of the Defendant's actions. I accordingly award him general damages to be assessed.

It is trite law that exemplary damages may be awarded in cases where the Defendant has acted in contumelious disregard of the Plaintiff's rights. In this case, it is highly regrettable that police officers who are expected to maintain law and order trespassed on the Plaintiff's property. I find that their action of excavating the Plaintiff's crops, razing down the perimeter fence, digging trenches on the gazetted access road and intimidating the Plaintiff and his workers was high handed and oppressive. I accordingly award the Plaintiff exemplary damages to be assessed.

I further find that the Defendants' actions were contrived to instill fear in the Plaintiff and to drive him off his farm for which he has title. This resulted in the Plaintiff suffering mental anguish and distress. Accordingly, I award him damages for that suffering to be assessed.

For the avoidance of doubt, I declare that the Plaintiff is the registered owner of farm L/3202/23. I award him general and exemplary damages as well as damages for mental anguish and distress to be assessed by the Learned Deputy Registrar. The Plaintiff's claim for special damages is unsuccessful. The damages are to be paid by the 1st and 2nd Defendants. Costs are for the Plaintiff to be assessed in default of agreement.

Dated this 25th day of July, 2018.


M. Mapani-Kawimbe
HIGH COURT JUDGE