

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA
(CIVIL JURISDICTION)

APPEAL NO.102/215



BETWEEN:

BEATRICE CHILESHE SINYANGWE ~~suing as~~
Administrator of the estate of late Kaleb H
Sinyangwe) and 22 others

APPELLANTS

AND

BARCLAYS BANK OF ZAMBIA LIMITED
CHATHAM INTERNATIONAL LIMITED
ARMCOR SECURITY LIMITED

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT

Coram: Hamaundu, Kaoma and Kabuka, JJS.

On 6th March, 2018 and 13th March, 2018

For the Appellants : Mr A.D.M. Mumba, Messrs A.D. Mwansa
Mumba & Associates
For the 1st Respondent : Mr I. Mabbolobbolo, Messrs Makala & Co
For the 2nd Respondent: (Not Present)
For the 3rd Respondent : Mr E.B. Mwansa, S.C., Messrs E.B.M
Chambers

JUDGMENT

Hamaundu, JS, delivered the Judgment of the court

Cases referred to:

1. **Kafue District Council v Chipulu [1995/1997] ZR 190**
2. **Attorney-General v Mpundu [1984] ZR, 8**
3. **Attorney General v Miyanda [1985] ZR 185**
4. **Swarp Spining Mills Plc v Sebastian Chileshe & Ors [2002] ZR 23**

5. **Musakanya and Shamwana v Attorney General [1981] ZR 221**
6. **Donoghue v Stevenson (1932) AC 562**
7. **Khalid Mohammed v Attorney General [1982] ZR 49**
8. **Galaunia Farms Limited v National Milling Company Limited [2004] ZR 1**

Workers referred to:

1. **Winfield & Jolowicz on Tort, 15th edition (1998, London, Sweet & Maxwell)**
2. **Halsbury's Laws of England, 3rd edition, volume 37, paras. 186 & 187**
3. **Clerk & Lindsell on Torts, 15th Edition, (1954, London, Sweet & Maxwell)**

This appeal is against the dismissal by the High Court of all of the appellants' claims.

The facts that emerged at the trial in the court below were these:

Beatrice Chileshe Sinyangwe, who was the 1st plaintiff in the court below, owned property in Makeni known as subdivision 13 of subdivision C of farm no. 401a. There was a man named Albert Sinyangwe who owned property known as subdivision 377 of farm no. 401(a). Albert Sinyangwe had mortgaged his farm to Barclays Bank Zambia Limited, the 1st respondent, to secure certain sums of money which he had borrowed. In 2000, the 1st respondent obtained judgment from the High Court in a mortgage action for

possession and sale of Albert Sinyangwe's property. On 14th August, 2001, the Sheriff of Zambia was inadvertently directed by the 1st and 2nd respondents to Beatrice Sinyangwe's property where the Sheriff proceeded to evict all occupants on the property and threw out all the goods. The 1st respondent then placed guards from the 3rd respondent on the property, who then ensured that none of the occupants went back thereon. Beatrice Sinyangwe made representations to the 1st respondent and was able to demonstrate that, in fact, execution had been effected on the wrong property. On 16th August, 2001, she, together with the other occupants of the property, moved back thereon.

The following year Beatrice Sinyangwe and the appellants herein commenced this action. Only twelve of the appellants were adults. The rest were minors. Of these, one minor was represented by William Kayombo while the rest were represented by Kaleb Sinyangwe.

We must state at this point that, in our view, the manner in which the action was pleaded proved to be the current appellants' undoing, as will be seen from our explanation later in the judgment. The action was predominantly pleaded on the tort of trespass to the

property, with the exception of the claim for trespass to goods which is a tort on its own. No attempt was made to give particulars as to the nature of the claim or claims that each plaintiff was prosecuting against the defendants. This resulted in the action being predominantly that of Beatrice Sinyangwe. There were some particulars provided with respect to some plaintiffs. These were as follows:

Beatrice Sinyangwe claimed to have lost K890,000 (old currency). Her husband Kaleb Sinyangwe claimed loss of K52,650,000. A plaintiff known as Getrude Nanyangwe claimed to have lost K350,000. Another plaintiff known as Dorothy Nakalumbi claimed loss of K15,255,000, while a plaintiff known as Lucy Kayombo claimed loss of K500,000. The plaintiffs also did produce a schedule of missing or damaged property. Kaleb Sinyangwe died before trial. His claim was then prosecuted by Beatrice Sinyangwe, as administrator of the estate.

The court below substantially awarded the claims by Beatrice Sinyangwe but dismissed all the claims of the other plaintiffs.

In particular, Dorothy Nakalumbi's claim for loss of K15,255,000 was dismissed for the following reasons;

- (i) that while she had stated that the said sum of money had been kept for her by Beatrice Sinyangwe, the latter in her testimony never mentioned it;
- (ii) that while she had stated that she was present during the eviction, she did not inform those removing the goods that her money was being kept in Beatrice Sinyangwe's bedroom; and,
- (iii) that even the letter of demand written by Beatrice Sinyangwe made no mention of that sum of money.

Getrude Nanyangwe's claim for loss of K350,000 and Lucy Kayombo's claim for K500,000 were dismissed because the court disbelieved Getrude Nanyangwe's testimony.

In disbelieving the testimony, the court observed that although Getrude Nanyangwe said that she lived in a servant's quarter where she had kept both her money and that of Lucy Kayombo, the letter of demand stated that the farm had only two servant's quarters which were occupied by married workers. The court further observed that Lucy Kayombo did not give testimony to substantiate her claim.

Kaleb Sinyangwe's claim for loss of K52,650,000 was dismissed for the following reasons;

- (i) The court noted that Beatrice Sinyangwe who gave testimony on the claim gave the impression that she was aware of the existence of the money; yet, when she arrived at the farm, she only remarked to one Adrian, a bank employee, that he should take note of the damaged items. The court felt that, at that point, it was expected of her to mention the loss of such a large sum of money;
- (ii) The court also noted that Beatrice Sinyangwe and her husband Kaleb Sinyangwe made no report of that money either to the Bank or to the police; and remained silent for two months; in the court's view, such conduct made it highly unlikely that Kaleb Sinyangwe suffered the loss that he claimed.

As regards the plaintiffs who were minors and those who lived in Beatrice Sinyangwe's house, the claim for illegal eviction was dismissed against them for the reason that, having no *locus standi* to maintain an action for the trespass to the land itself, they could not maintain an action for wrongful eviction, which was predicated

on the action for trespass; and that their position could be likened to that of a licensee or lodger. As for the plaintiffs who occupied the servants quarters, their claim for wrongful eviction was dismissed on the ground that, being servants, they could not be said to have been in possession of the land; and that no specific evidence was led on their claim.

On the claim for trespass to goods, the court held that, as no specific evidence was led by the other plaintiffs as regards ownership, all the household goods were deemed to be in the legal possession of Beatrice Sinyangwe. Hence, only Beatrice Sinyangwe was awarded the claim with respect to all the property that was listed in the schedule.

It is the other plaintiffs who have now appealed; and are before us as appellants. Beatrice Sinyangwe has not appealed, but appears as administrator of the estate of Kaleb Sinyangwe.

The appeal by the appellants is based on five grounds. These revolve around the following two issues:

- (i) That the court below was wrong to base its dismissal of the appellants' claims for damages for wrongful eviction

and for trespass to their personal goods on the ground that; because they were not in legal possession of the property they could not maintain an action for trespass to land, and that such incapacity denied them the right to maintain an action for the wrong eviction and for the trespass to goods; and,

- (ii) That the court below misapprehended the facts when it dismissed Kaleb Sinyangwe's claim for loss of K52,650,000 and Lucy Kayombo's claim for loss of K500,000.

The thrust of the appellants' argument on the first issue is that the appellants were individuals, in their own right, with lives of their own which were independent of Beatrice Sinyangwe. It was argued that the court below having observed that the appellants were undeniably distressed, inconvenienced and had suffered discomfort as a result of the eviction, it was wrong for it to deny them damages on the ground that they were mere licencees or lodgers on Beatrice Sinyangwe's property. In this regard, they took issue with the lower court's statement that the appellants would have best served as witnesses to prove Beatrice Sinyangwe's claim.

The appellants submitted that there are a number of authorities which support the award of damages for mental distress and inconvenience. Notable among the authorities cited was the case of **Kafue District Council v Chipulu**⁽¹⁾. Other cases cited were **Attorney-General v Mpundu**⁽²⁾, **Attorney General v Miyanda**⁽³⁾, **Swarp Spining Mills Plc v Sebastian Chileshe & Ors**⁽⁴⁾ and **Musakanya and Shamwana v Attorney General**⁽⁵⁾. Authorities on the subject of joinder of parties to an action were also cited. We do not think joinder or non-joinder was a real issue in this matter.

In response, it was submitted by the respondent that the question for consideration was whether the appellants who did not have exclusive possession of the property could maintain an action in trespass; and successfully claim damages predicated on that cause of action. The respondent argued that the appellants could not. In support of that argument, we were referred to a text in the works **Winfield & Jolowicz on Tort, 15th edition** which provides that mere presence on land does not amount to possession which can give rise to a cause of action for trespass. The text goes on to provide that a lodger in another's house, a servant occupying a room in his master's house or a guest in a hotel are examples of

such presence which does not amount to possession. It was submitted that, in this case, only Beatrice Sinyangwe had a cause of action for trespass to the property and that she was correctly awarded damages for trespass and other valid claims. The respondent submitted that the case of **Kafue District Council v Chipulu⁽¹⁾** was cited out of context because, in that case, the respondent had a *bonafide* cause of action. In this case, it was argued, there was none.

We have considered the arguments on this issue.

Indeed, we agree with the respondents' contention that the appellants have applied our decision in **Kafue District Council v Chipulu⁽¹⁾** out of context. Mental distress or inconvenience are not recognized heads of tort but are heads of damages that are recoverable after a party has proved liability for a tort or breach of contract. Hence, one cannot claim them without first proving the commission of a tort or the breach of a contract. In the *Chipulu* case, the respondent had first proved wrongful termination of employment.

In this case, the appellants sought directly damages for mental stress and inconvenience. They needed first to establish liability

under a recognized head of tort. **Halsbury's Laws of England**, provides under the heading "*nature and elements of liability*" as follows:

"Those civil rights of actions which are available under English common law for the recovery of unliquidated damages by persons who have sustained injury or loss from acts, statements or omissions of others in breach of duty or contravention of right imposed or conferred by law rather than by agreement are rights of action in tort." (para 186).

The authors go on to provide;

"The scope of the rights to relief so made available by English Law constitutes what has been termed the province of the law of tort. The historical origins of English jurisprudence and the consequential importance which was formerly attached to particular forms of action have led to the division of this province into distinct domains, for example, trespass, nuisance, detinue, negligence...."

In this case, the claims by the appellants for damages arising out of the wrongful eviction were defeated simply because they were prosecuted under the umbrella of Beatrice Sinyangwe's action for trespass to her property. Certainly, that tort of trespass was very restrictive of the appellants. We think that there was a tort, which

was much broader in scope, under which the appellants could have prosecuted their claim.

An examination of the facts giving rise to the eviction shows that this was a case of the 1st respondent and its agents not exercising due care in executing a judgment of the court. In the works **Clerk & Lindsell on Torts**, the tort of negligence is described as:

“.....the absence of the exercise of the amount of care prescribed by the law where a duty to exercise care exists, which results in damage to another.” (para 563)

In this case, not only Beatrice Sinyangwe but all the occupants on the property suffered consequences of the eviction. That eviction was an action which directly and immediately flowed from the 1st respondent's execution of a court judgment on the wrong property. The execution on the wrong property arose from want of due care by the 1st respondent and its agents in identifying the property which was the subject of the court's judgment. There were no better circumstances than these in which to apply the “*neighbour*” test propounded in **Donoghue v Stevenson**⁽⁶⁾. Alas, that was not to be, as the claims were prosecuted under the umbrella of Beatrice Sinyangwe's action for trespass to her

property. As we said at the beginning, that was the appellants' undoing. Therefore, the appellants cannot now blame the court below for deciding the whole matter predominantly under the tort of trespass to Beatrice Sinyangwe's property.

With regard to the claim for trespass to goods, it is not correct that the appellants' claim was dismissed on the ground that they had no *locus standi*. The claim was dismissed because they led no evidence as to what property belonged to them. In the end, all the property that was listed in the schedule was deemed to belong to Beatrice Sinyangwe who was then awarded damages accordingly.

The second issue is on the money claimed.

The appellants argued that the court below ignored its own findings that Kaleb Sinyangwe was an industrious person, economically; and that it was not customary to issue receipts in the nature of his business. It was argued that the court also ignored evidence that Kaleb Sinyangwe had provided, namely; proof of ownership of the trucks that he used for his business; and, the receipt of a sum of K6,650,000 from National Milling Corporation for the sale of maize.

With regard to Lucy Kayombo, it was submitted that the court ignored the testimony of Getrude Nanyangwe who testified, in support of her claim and that of Lucy Kayombo, that she was a civil servant and that she was engaged in what was called "*Chilimba*" whereby she received some money during the month.

The appellants argued that, with all the above evidence which it ignored, the court erred in finding that Kaleb Sinyangwe and Lucy Kayombo had not proved the loss of their money.

In response, the 1st respondent supported the trial court's view that Kaleb Sinyangwe's conduct was not consistent with that of a person who could truly have lost the amounts that he claimed. The 1st respondent also supported the reasons for the trial court's rejection of the claims by Getrude Nanyangwe and Lucy Kayombo. It was submitted that this was a case where the appellants simply failed to prove their claims. We were referred to the cases of **Khalid Mohammed v Attorney General**⁽⁷⁾ and **Galaunia Farms Limited v National Milling Company Limited**⁽⁸⁾ in support of that submission.

Our view on this issue is this: the trial court dismissed the money claims essentially on the ground that the evidence adduced

thereon was not credible. We have said in a number of cases that an appellate court will be slow to interfere with findings which are based on the credibility of the testimony presented. In this case, what militated heavily against Kaleb Sinyangwe's evidence of his business industry was his conduct after the loss of his money. Indeed, like the court below, we, too, find it very strange that a person who loses a sum of money that Kaleb Sinyangwe is said to have lost cannot immediately report the loss to the police or complain about it to the 1st respondent. In our view, the court below was on firm ground to find that the conduct of Kaleb Sinyangwe far outweighed the evidence that he had presented. Hence, the court was entitled to disbelieve the evidence presented to support Kaleb Sinyangwe's version of the story.

As for Lucy Kayombo's claim of K500,000, again the court disbelieved the story of Getrude Nanyangwe who claimed that she had kept her sum of K350,000 and Lucy Kayombo's K500,000 in her room. One of the reasons the court below disbelieved her story was that her sum of money was not even mentioned in the letter of demand. As for Lucy Kayombo, she did not testify in court to help

redeem Getrude Nanyangwe's testimony. Hence, the court below was entitled not to accept the testimony of Getrude Nanyangwe.

In the end, we see no ground for faulting the trial court for dismissing all the claims concerning loss of money.

The final result is that the whole appeal has no merit. We dismiss it, with costs to the respondents.



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E. M. Hamaundu
SUPREME COURT JUDGE



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R. M. C. Kaoma
SUPREME COURT JUDGE



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J. K. Kabuka
SUPREME COURT JUDGE