



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NUMBER 320 OF 2020

BETWEEN:

DUNKENI MALOTA and SAMUEL KADUYA (suing on their own behalf
and on behalf of 37 others whose property was damaged in the course of
carrying out Thuchira River diversion works.....CLAIMANTS

-AND-

PHALOMBE DISTRICT COUNCIL..... 1ST DEFENDANT
MULANJE DISTRICT COUNCIL.....2ND DEFENDANT
EMMAC CONSTRUCTION COMPANY.....3RD DEFENDANT

Coram:

T.Soko Assistant Registrar

Mr Chizimba: Counsel for the Claimants

Defendants: Absent

N. Munthali: Court interpreter



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EMMAC CONSTRUCTION COMPANY..... **3RD DEFENDANT**

ORDER ON ASSESSMENT OF DAMAGES

The Claimants herein commenced an action against the Defendants seeking an order compelling the Defendants to assess the Claimants' appropriate compensation for their affected properties, an order requiring the Defendants to award compensation to the Claimants, damages for trespass to land, damages for inconvenience and costs of the action. On 28th January 2021, the court entered judgment in favour of the Claimants. The facts of the case aver that in or around April 2018, the claimants were visited by a District Councils for Phalombe and Mulanje and were addressed that their properties would be affected as government intended to divert water from Thuchira river to prevent flooding. The claimant stated that they had no problems with the intentions of the Government. They were expecting that Government would compensate them but this did not happen and were told that the works to be carried out were to do with the development of the area. The works started and the defendants dug up the land belonging to the claimants and diverted water through it. The defendants further destroyed natural and fruit trees on the said land. Further the defendants destroyed the farm produce belonging on the said land.

In evidence, the claimant who also represented all the claimant adopted his witness statement and stated as follows:

1. THAT my name is Dunkan Malota and I am of full age. I come from Chabwera village Traditional Authority Mkanda in Mulanje district. I am one of the Claimants herein and, by reason thereof, I am therefore entitled to swear this statement. I make this statement on my own behalf and on behalf of the Claimants herein.
2. THAT in this statement, unless otherwise stated, I depone to matters of fact known personally to me and I present the same to court conscientiously believing the information to be true to the best of my knowledge and belief.
3. THAT the 1st and the 2nd Defendants were at all material times local government authorities vested with control and management of Phalombe and Mulanje districts respectively. The 3rd Defendant is a duly registered construction company in Malawi.
4. THAT in or around the month of April, 2018, officials from the Defendants visited us and told us that our land would be affected by the Malawi government project of diverting Thuchira River and we had no problems with that as we were of the view that we would be appropriately duly compensated. The said works commenced in or around August, 2018.
5. THAT since our land was taken, we asked the Defendants to compensate us so that we use the compensation to find alternative land. We were however greatly shocked when the Defendants told us that we would not be compensated telling us that the diversion of the river was for the development of our area. The Defendants herein unjustifiably interfered with our possession of land as they entered on our pieces of property. The Defendants forced us out of our respective lands. They dug our lands and diverted Thuchira River through our land destroying our crops and trees on the land. The Defendants refused to compensate us on their interference with our enjoyment of our land. If we had sold those crops the Defendants herein destroyed, we could have made a lot of money. We were also forced to use our savings to rent gardens from people so that we cultivated crops during agricultural seasons. I therefore pray that the Claimants herein and I be compensated for the actions of the Defendants herein trespassing on our land and that we be refunded MK150, 000.00 each for the 3 years from 2018 to 2020 that we have been renting gardens at MK50, 000.00 per each agricultural season.

6. THAT since the Defendants were refusing to compensate us, we were forced to spend money on transport and phone calls and our precious time to follow up on the issue. We suffered great inconvenience in this regard as, on several occasions and on divers dates, I and other Claimants herein as representatives, either physically met or called the officials from Phalombe and Mulanje District Councils and EMMAC Construction pleading with them to compensate us. But the Defendants never compensated despite all our pleadings to them for compensation. We were thus forced to abandon our routine to follow up on our compensation issue and spent **MK800, 000.00** in transport, airtime, and logistics. We then had no option but to engage lawyers to help us. We then engaged Messrs Micklaw and Company who charged us **MK1, 000, 000.00** which we are yet to pay. I therefore pray that the court should award us the sum of **MK800, 000.00** as damages for inconvenience. Unfortunately, we were never given receipts for each time we travelled or for each call we made. In fact, our minibuses do not issue receipts. We also pray to court that the court orders the Defendants to refund us the sum of **MK1, 000, 000.00** which we owe our lawyers as we could not have hired the lawyers herein had the Defendants duly compensated us. I attach and exhibit hereto the bill from our lawyers marked "DM".

7. THAT therefore I pray that the Claimants and I be compensated for trespass to our land and we be awarded damages in the sum of **MK800, 000.00** for inconvenience, and that we be refunded **MK1, 000, 000.00** we owe our lawyers.

8. THAT I therefore claim that we be paid appropriate compensation for our affected properties and we be paid damages for trespass to land, damages for inconvenience, refund of legal fees, and costs of this action.

9. THAT I make this statement knowing that the contents thereof are true to the best of my knowledge, information and belief and knowing if I have willfully stated in it anything that I know to be untrue I shall be liable to prosecution.

The claimants also paraded an expert witness. He adopted his witness statement where he stated as follows:

1. **THAT** my name is **Albert Rozario** and I am of full age. I am the Director at ALWA Consultants of P.O. Box 255 Blantyre in the **Republic of Malawi**. I was engaged by **Messrs Micklaw and Company** to assess the appropriate compensation for the Claimants' property which was damaged by the Defendants in the course of carrying out Thuchira River diversion works and, by reason thereof, I am therefore entitled to swear this statement. I make this statement on behalf of the Claimants herein.
2. **THAT** in this statement, unless otherwise stated, I depone to matters of fact known personally to me and I present the same to court conscientiously believing the information to be true to the best of my knowledge and belief.
3. **THAT** I have a Bachelor's Degree in Social Science and a Master's Degree in Development Studies both from the University of Malawi. I have 8 years of post-qualification experience in resettlement and assessment of compensation for affected property. I am the Director at ALWA Consultants, a resettlement consulting company. ALWA Consultants has vast social and technical knowledge and experience in assessment of compensation, resettlement supervision and advisory, grievance management and mapping and shapefiles having worked in Malawi's biggest resettlement projects for Vale Logistics, Millenium Challenge Malawi, Fichtner Consulting Engineers, SRK Consulting, SMEC Private Limited, and Diagonal Limited.
4. **THAT** on or about 27th day of February, 2021 I met the Claimants herein at Chabwera village, Traditional Authority Nkanda in Mulanje district where I briefed them that I would assess the appropriate compensation for their affected property in the Thuchira River diversion works. In attendance were the Claimants herein from the said Chabwera village, Traditional Authority Nkanda in Mulanje district and Chanasa village, Traditional Authority Mkumba in Phalombe district. The Claimants set 2nd March, 2021 for the assessment exercise.
5. **THAT** on or about 2nd March, 2021 I toured the Claimants' affected property herein and I took shapefiles and coordinates of their affected land.
6. **THAT** I then collected data in respect of the percentage of each of the Claimant's land that was affected, the crops on it as well as the trees. I also collected data with respect to

each of the Claimant's social and economic life. I then asked the Village Head and Group Village Head for both Chabwera and Chanasa villages to confirm the data collected for each of the Claimants by signing for each of the Claimant's individual assessment forms. The Village Head and Group Village Head for both districts duly confirmed by signing for each of the Claimant's individual forms. I attach and exhibit hereto 4 such individual forms as samples marked "AR 1".

7. **THAT** thereafter I proceeded to assess the appropriate compensation for each of the Claimant's affected properties, namely; land, crops, and trees. I then came up with a total for each Claimant and an overall total for all the Claimants herein. In this respect, the overall total of compensation assessed for all the Claimant is MK8, 763, 998.39. I attach and exhibit hereto a copy of my assessment of compensation herein marked "AR 2".
8. **THAT** I therefore pray that the Court should assess the Claimants' appropriate compensation for their affected properties in the Thuchira river diversion works in the sum of MK8, 763, 998.39.
9. **THAT** I make this statement knowing and believing that the contents thereof are true to the best of my knowledge, information and belief and knowing if I have willfully stated in it anything that I know to be untrue I shall be liable to prosecution.

In the present matter I have to determine the appropriate quantum of damages to be awarded to the claimants.

THE LAW ON ASSESSMENT OF DAMAGES

- 1.1.1. The purpose of an award of damages is to as much as money can do it place the Plaintiff in a position he would have been had he not suffered the damage. See: Cassel and Company -vs- Broome [1972] 1 All ER 801. In George Kankhuni -vs- Shire Bus Lines Ltd Civil Cause No. 1905 of 2002, Katsala, J stated as follows:-

"The law demands that the plaintiff, as far as money can do it, be put in the same position as if he has not suffered the loss. This is what is referred to as restitution in intergrum"

1.1.2. In awarding damages, the law will endeavour, so far as money can do it, to place the injured person in the same position he would have been before the injury. See: *Halsbury's Laws of England* (3rd edn.) p.233.

1.1.3. It is also trite that when awarding damages, the court has to take into account the depreciation of the Malawian currency by taking into account the time the awards were made. See: Malamulo Hospital (The Registered Trustees) -vs- Mangani [1996] MLR 486 (SCA).

Regarding assessment of fair compensation Section 9(1) of the Land Acquisition Act (Chapter 58:04, Laws of Malawi) states that where the Government of Malawi compulsorily acquires land, the government shall pay fair compensation. The section reads as follows:

"Subject to the provisions of this Act, where any land is acquired by the Minister under this Act the Minister shall on behalf of the Government pay in respect thereof fair compensation agreed or determined in accordance with the provisions of this Act."
(Emphasis added)

Section 10 of the Land Acquisition Act provides for the formula for assessing the compensation. It reads as follows:-

"(1) Unless otherwise agreed between the parties fair compensation shall be assessed by the Minister.

(2) An assessment of compensation made by the Minister under this section shall be calculated by adding together—

(a) the consideration which the person entitled to the land paid in acquiring it;

(b) the value of unexhausted improvements to the land made at the expense of the person entitled thereto since the date of his acquisition thereof; and

(c) any other appreciation in the value of the land since the date of such acquisition.

(3) In this section "unexhausted improvements" means anything permanently attached to the land directly resulting from the expenditure of capital or labour and increasing the productive capacity, utility or amenity thereof, but does not include the results of ordinary cultivation other than standing crops and growing produce.

(4) In calculating an assessment of compensation under this section no amount shall be included under paragraph (c) of subsection (2) in any case where the Minister is satisfied that the person entitled to the land has, either through absence from the country or otherwise, failed unreasonably to develop the land, or in the case of agricultural land to cultivate or supervise it satisfactorily.

(5) In any case where the Minister is satisfied that a person acquired the land by way of gift or inheritance or otherwise without payment of full consideration, or by way of any fictitious or artificial transaction, he shall substitute for the compensation referred to in paragraphs (a) and (b) of subsection (2) an amount equal to the consideration paid on the last preceding acquisition of the land concerned plus the value of unexhausted improvements made to the land since the date of such preceding acquisition at the expense of the person entitled to the land at the time the improvements were made."

In the matter before me it is evident that the Defendants destroyed the Claimants' land, crops, and trees in the Thuchira River diversion works without compensating them. The 2nd witness who was called as an expert witness assessed the compensation and came up with K8,763,998.39 as a fair compensation to the claimants. I therefore award K8,763,998.39 and to be shared in accordance with exhibit 'AR2'.

Coming to the issue of awarding damages for trespass. Trespass is defined as an unjustifiable interference with a person's possession of one's land. See: Hegan -vs- Carolan [1916] 2TR 27.

Mwaungulu J (as he then was) in the case of Tea Brokers (Central Africa) Ltd -vs- Bhagat [1994] MLR 339 (HC) it was held that every invasion on private property, however minute, amounts to trespass and the minuteness of the trespass will only go to determine what amount of damages should be awarded. In a Canadian case of Warren -vs- Desplippes [1872] 33 UCR 59 (Canada) it was held that an action in trespass will lie for injury to that right alone although no appreciable damage has been caused to the land.

The Court of Appeal in Whitwham -vs- Westminster Brymbo Coal and Coke Company [1896] 2 Ch 538 identified the heads of damages in trespass as follows where the Lord Justices of the Court of Appeal, Lord Justice Lindley, said:

"The plaintiffs have been injured in two ways. First, they have had the value of their land diminished; secondly they have lost use of their land, and the defendants have had it for their own benefit. It is unjust to leave out of sight the use which the defendants have made of this land for their own purposes, and that it lies at the bottom of what are called 'way leave cases'. Those cases are based upon the principle that if one person has without leave of another used that other's land for his own purposes, he ought to pay for such use."

And Lord Justice Lopes said:

"Now, applying that principle here, what else have the plaintiffs suffered in consequence of the wrongful act of the defendants? The value of their land beyond all question has been diminished; and Mr Russel admits that the plaintiffs are entitled to be paid in respect of that. But there is something more in respect of which I think the plaintiffs are entitled to be compensated and that is for the use the defendants have made of the plaintiff's land during some eight years past." (Emphasis added)

In the case at hand, the Claimants lost use of their land since the time it was taken by the defendants up to this date. Counsel submitted that the claimants should be awarded a sum of MK1, 500, 000.00 being the loss of use of their land for 3 years at MK500, 000.00 per year. Counsel also prayed that each Claimants should be awarded a sum of K150,000.00 being the amount each Claimant paid as rental fees for 3 years at MK50, 000.00 per each agricultural season in renting gardens to grow crops. In total, the claimants pray for a sum of MK1, 650, 000.00 to each of the Claimants as damages for trespass to land giving us a sum total of MK64, 350, 000.00. In my mind, K1,500,000.00 is on the higher side, I award K1,200,000.00 to each claimant. In my view the K150,000.00 has not been proved. Be as it may, the claimants lost use of their land and definitely they had to find another land to farm. In my view K100,000.00 each will be adequate in renting gardens for three years.

On damages for inconvenience, these are awarded where substantial physical inconvenience and discomfort was caused or affected by the negligent or otherwise unlawful action or omission of the defendant. See: Hobbs -vs- LSW Ry [1885] 10 QB 111 per Mellor J.

In the case of Charles Kambendera -vs- Daniso Oongwani and Prime Insurance Co Ltd, Civil Cause No. 178 of 2018, the claimant therein suffered inconvenience of abandoning his routine in pursuit of having his damaged motor vehicle repaired, having to visit his hospitalized driver, and having to walk on foot and was awarded **MK500, 000.00** as damages for inconvenience. The award was made on **6th day of March, 2019**.

In the matter at hand, Counsel stated that the Claimants were forced to spend money on transport and phone calls and their precious time to follow up on the issue of their compensation and had to abandon their routine as a result. The Claimants in evidence stated that they suffered great inconvenience in this regard as, on several occasions and on divers dates, either physically met or called the officials from Phalombe and Mulanje District Councils and EMMAC Construction pleading with them to compensate them and spent **MK800, 000.00** in transport, airtime, and logistics. The Claimants have also stated that they were forced to hire lawyers to pursue their claim and engaged Messrs Micklaw and Company who charged them **MK1, 000, 000.00** which they are failing to pay. Counsel stated that **Mwaungulu J** (as he then was) in the case of Tea Brokers (Central Africa) Ltd -vs- Bhagat (cited above) awarded the claimant in that case costs of bringing the surveyor even though the same was never pleaded stating that the costs were justifiably incurred and had to be reimbursed. **Mwaungulu** stated as follows: -

"Apart from the cost of replacing the hedge, the plaintiff is also entitled, in my view, to the expense of bringing the surveyor to relocate the beacons and the boundary between Plot No. LC 18 and Plot No. LC 15. That they are entitled to this expense was decided in Rose v Miles (1815) 5 M & S 101.... I find, therefore, that the plaintiffs are also entitled to damages for the surveys."

I award K800,000.00 as damages for inconvenience and the legal fees of K1,000,000.00 and the same should not be claimed in taxation of costs.

In total, therefore, I award the Claimants herein a total sum of K61,263,998.39

Made on this 14th day of December 2021.

Costs are for the claimants.



T.Soko

Assistant Registrar

LIST OF THE CLAIMANTS

- 1. Dunken Malota**
- 2. Samuel Kaduya**
- 3. Salome Patrick**
- 4. Funny John**
- 5. Mary Magombo**
- 6. Osman Misonje**
- 7. Linda Banet**
- 8. Enelesi Kamfosi**
- 9. Wyson M. Gomani**
- 10. Elube Magombo**
- 11. Asigatiya Missi**
- 12. Clement Malamba**
- 13. Matanda Mahomedi**
- 14. Mary Lipenga**
- 15. Catherine Kamfosi**
- 16. Amani Magombo**
- 17. Gladys Barnet**
- 18. Rose Masamba**
- 19. Listone Wyson**
- 20. Laisani Adani**
- 21. Wilson Sadibwa**
- 22. Lyson L. Maumba**
- 23. Twaya Lipenga**
- 24. Firston Thomondo**
- 25. Doreen Malinda**
- 26. Livison Malimwe**
- 27. Lucy Bakili**
- 28. Annie Kachisi**
- 29. Magret Lupiya**
- 30. Fanny Matika**
- 31. Dorothy Moleni**

- 32. Estere Stambuli
- 33. Chifundo Malinda
- 34. Lizie Bamusi
- 35. Willard Mwele
- 36. Agness Macheso
- 37. Estere Namanja
- 38. Frank Natchithi
- 39. FelixDowesi