

**ZAMBIA NATIONAL BUILDING SOCIETY v ERNEST MUKWAMATABA
NAYUNDA (1993) S.J. 33 (S.C.)**

SUPREME COURT
NGULUBE, CJ; SAKALA AND CHIRWA, JJ.S.
16TH MARCH, 13TH MAY, 1ST JULY AND 20TH AUGUST, 1993
S.C.Z. JUDGMENT NO. 11 OF 1993

Flynote

Property Law - Damages - Where mortgage property is vandalised.

Headnote

The Plaintiff was the registered owner of a farm in Lusaka and had obtained a Mortgage from the Defendant to build a dwelling house on the said farm. As he had to leave Lusaka for Mongu and in order to service the Mortgage, the Plaintiff approached the Defendant with a request that they take over the house and look for a tenant for it and with the proceeds from the rent service the Mortgage. The Defendant agreed to take up the house and found a tenant for the house, namely Lenco Limited. However after sometime, Lenco Limited left the house without informing the Defendant and as the house was left unoccupied it became so vandalised that it was virtually destroyed. The Plaintiff, therefore claimed from the Defendant the repair of the house and mesne profits in form of rent and profits. On the facts of the case, the Plaintiff obtained an interlocutory judgment and was later awarded damages for the replacement of the house which damages carried 10% compound interest per month until final payment and it is against the award of compound interest that the Defendants appealed to the Supreme Court.

Held:

(1) The essence of damages has always been that the injured party should be put, as far as monetary compensation can go, in about the same position he would have been had he not been injured. He should not be in a prejudiced position nor be unjustly enriched

Case referred to:

1. Miller v Attorney General (1983) Z.R.66

For the Appellant: Mr. L. Nyembele of Ellis & Co.

For the Respondent: Mr. N. Kawanambulu & Co.

Judgment

CHIRWA, J.S.: Delivered the judgment of the Court.

This is an appeal by the Zambia National Building Society (in this judgment referred to as Defendant for that is what they were in the Court below) against an award of 10% compound interest on damages awarded by the Deputy Registrar to the respondent Ernest Mukwamataba Nayunda (herein referred to as the Plaintiff)

The undisputed background to the matter is that the Plaintiff was the registered owner of property known as Subdivision 12 of Subdivision B of Farm No. 2344 Lusaka and had obtained a Mortgage from the Defendant to build a dwelling house on this property. As he had to leave Lusaka for Mongu and in order to service the Mortgage, the Plaintiff approached the Defendant

with a request that they take over the house and look for a tenant for it and with the proceeds from the rent service the Mortgage. The Defendant agreed to take up the house and found a tenant for the house, namely Lenco Limited. However after sometime, Lenco Limited left the house without informing the Defendant and as the house was left unoccupied it became so vandalised that it was virtually destroyed. The Plaintiff, therefore claimed from the Defendant the repair of the house and mesne profits in form of rent and profits. On the facts of the case, the Plaintiff obtained an interlocutory judgment and the case came before the Deputy Registrar for assessment of damages. Among the damages awarded by the Deputy Registrar is a sum for the replacement of the house at a total cost of K6,935,262.50 and this award carried 10% compound interest per month from 4th April, 1991 until final payment and it is against the award of compound interest that the Defendants have appealed to this court.

On behalf of the Defendant Mr. Nyembele has argued one main ground of appeal against the award of 10% compound interest per month on the award of damages given and from there the other argument of unjust enrichment follows. In presenting his argument, Mr. Nyembele argued that the award was unlawful in that it was against the provisions of Section 4 of the Law Reform (Miscellaneous Provisions) Act, Cap. 74 in that the provisions therein prohibit the award of interest upon interest for that is what compound interest means. He argues that the Deputy Registrar should have awarded simple interest per annum and under order 30 (8) of the High Court Rules, Cap. 50 and Section 2 of Judgments Act, Cap. 89 the interest chargeable at the material time was 6% per annum. Mr. Nyembele also took cognizance of this court's decisions where interest has varied from 12% to 15% simple interest taking into account currency fluctuations.

Mr. Nyembele submitted that an award of compound interest would amount to adjust enrichment to the Plaintiff in that the ultimate sum would be more than compensatory and to support his argument he referred to this Court's decision in *Miller v The Attorney -General* (1)

The final argument by the Defendant was against the learned Deputy Registrar's amendment of interest on other awards from 30% simple interest to 10% compound interest. It was argued that the change in interest form and rate was not a mere correction of clerical mistake or error due to accidental slip but amounted to review of the earlier Judgment and that as such the Deputy Registrar had no powers as power to review a Judgment or Order is only given to a Judge under Order 39 of the High Court Rules.

After Mr. Nyembele's address to the Court and upon enquiries from the Court the parties were agreed to have latest valuation report on the re-construction of the house from the original architects or other reputable architects with a view agreeing on the cost of re-building the house. Both parties put in their latest valuations and it is clear from those reports that re-building the house would be quite substantial but the difference between the expert's figures is very marginal.

While the Court was still looking at figures of revaluation reports Mr. Kawanambulu filed in on behalf of the Plaintiff an Originating Notice of Motion or leave of extension of time within which to cross-appeal against the Deputy Registrar's assessment. The reason given for the delay in appealing early was that the Plaintiff believed that the amount arising from compound monthly interest on the assessed damages would be adequate to enable him to re-build the house and this may not be possible if further assessment of re-building costs were made. And that in any event the Defendant never appealed against the award of compound monthly interest and only did so with the leave of the Court at the hearing.

After hearing Counsel for the Plaintiff, we refused to grant leave for extension of time within which to cross-appeal and said that we would give our reasons in the main Judgment and this we now do.

The argument that the Deputy Registrar erred in rejecting the claim on the verandah and servants' quarters can be adequately compensated as the whole house. In fact the whole appeal centres on the question of excessive or otherwise compensation awarded and the respondent could only argue this case in the main appeal.

On the question of the Deputy Registrar rejecting the architect's and registrar's and engineer's fees, these are specific and itemized costs that can be claimed under the bill of costs at the end of the day for that is what they are.

We now come to the main appeal. As we have already outlined the case the main argument in the appeal is that the Deputy Registrar erred in awarding compound interest on the award given. It would appear that compound interest rate was used as a disguised way of taking into account the high inflatory trend in the country. This is not what it should be because there can be no doubt that Section 4 of the Law Reform (Miscellaneous Provision) Act Cap. 74 forbids the awarding of compound interest. Regard, in awarding damages, should be had to the provisions of Order 36(8) of the High Court Rules and Section 2 of the Judgment Act Cap. 89 and this Court's various decisions in which we have awarded interest varying from 12% to 15% for various reasons given in the individual cases. The essence of damages has always been that the injured party should be put, as far as monetary compensation can go, in about the same position he would have been had he not been injured. He should not be in a prejudiced position nor be unjustly enriched. Bearing this in mind and also what we said in *Miller's* case (1), Courts should adequately compensate the injured party.

In the present case, the award given to us seems to have been inadequate, especially if we look at the latest architects' evaluations. However charging compound interest on this award, we are of the view that the Plaintiff would be unjustly enriched. In this respect therefore we allow the appeal against the award of compound interest and in doing so we will also disturb the amount of damages awarded as we feel it is inadequate. We will therefore take the latest architect's evaluations as the most equitable guidance on the measure of damages. To this extent we award the plaintiff K60,000,000 with interest at 14% from April, 1993 until payment is made. From this award will be deducted the sum already paid to the Plaintiff by the Defendant.

Having allowed the appeal against compound interest on the award of damages for the reconstruction of the house, the reasons advanced for allowing that part of the appeal equally apply to the award of compound interest on other damages awarded by the Deputy Registrar, namely 10% per month on the K70,000 and K150,000 awarded. The Deputy Registrar misdirected himself when he amended the percentage from 30% to 10% as that amounted to review of his earlier decision and he has no powers to review his own decision. Under the circumstances of this case, we see no reason for awarding different interest rates. We allow this part of the appeal also and set aside the 10% compound interest and in its place we award 14% simple interest from date of Judgment up to date of payment.

Having allowed the appeal, costs will follow the event.
Appeal allowed
