

ZAMBIA NATIONAL COMMERCIAL BANK LIMITED v KAPEKA BUTTON MHONE

Supreme Court
Ngulube, CJ, Sakala and Chirwa JJS
27th June, 2000 and 13th September, 2000
(SCZ Judgment No. 30 of 2000)

Flynote

Legal Practitioners - Public Policy - Public expected to repose trust and confidence in the legal profession.

Tort - Damages - Remoteness - Novus Actus Interveniens.

Headnote

The respondent was the owner of three properties whose certificates of title he deposited with the bank by way of mortgage to secure some money which he had borrowed from them. When pressed for payment, the respondent's lawyers confirmed to the bank's lawyers that one of the plots was to be sold to an intending purchaser to raise the required funds. Subsequently, the respondent withdrew instructions from his lawyers and did not sign the assignment prepared by his lawyers. Meanwhile, the intending purchaser paid off the respondent's indebtedness to the bank which executed a memorandum of discharge of the mortgage and which released the title deeds to the intending purchaser's lawyers. The intending purchaser somewhat managed to register the assignment which the respondent had not signed and he got the title deeds registered in his name. He also took possession of the disputed property.

Eventually, the respondent sued the bank claiming damages for the conversion of his three certificates of title in respect of his three properties which he claimed were wrongfully released to the lawyers of the intending purchaser contrary to the terms and conditions of the mortgage. The learned trial Judge held that the bank had acted in breach of agreement as well as negligently when it released the title deeds to a third party without the consent of the respondent. The bank appealed on the question of liability and on the awards which were said to be either too remote or unsubstantiated.

HELD:

- (i) There is an important public policy consideration that persons dealing with members of an honourable profession like lawyers can safely expect to repose trust and confidence. There is no carelessness involved in taking the word of a lawyer.
- (ii) The bank was not privy to wrong actions. At any rate, the action could not be regarded

as a matter of causation, as having flowed directly from the act of releasing the title deeds.

Cases Referred to:-

1. *Weld-Blundell v Stephens* [1920] AC 956.
2. *Koufos v Czarnikow Limited* [1969] 1 AC 350.
3. *Caxton Publishing Company Limited v Sutherland Publishing Company Limited* [1939] AC 178 .

C. Mabutwe of Mabutwe and Associates for the appellant.
P. Matibini of MNB Legal Practitioners for the respondent.

Judgment

NGULUBE C.J., delivered the judgment of the Court.

For convenience, we will refer to the respondent as the plaintiff and the appellant as the bank. The plaintiff was the owner of three properties whose certificates of title he deposited with the bank by way of mortgage to secure some money which he had borrowed from them. There was evidence that when pressed for payment the plaintiff's lawyers at the time, Messrs Ezugha, Musonda and Company, confirmed to the bank's lawyers, Messrs Jaques and Partners, that one of the plots – Plot 5044 Kitwe – was to be sold to a purchaser to raise the needed funds. A proposed sale to a company represented by a Mr Nando fell through. However, Messrs Ezugha, Musonda and Company subsequently prepared a standard Law Association of Zambia contract of sale where the purchaser was a Mr Leonard Milimo who was represented by Messrs Ellis and Company. This contract was signed by the plaintiff and witnessed by the learned Mr William Nyirenda of Ezugha, Musonda and Company. Mr Milimo also signed this contract which he took to the learned Mr Frank Lwambano of Ellis and Company who prepared an assignment. At some stage, the plaintiff appears to have repented of the transaction: He withdrew instructions from Messrs Ezugha, Musonda and Company and he did not sign the assignment. Meanwhile, Mr Milimo had already paid off the plaintiff's indebtedness to the bank which executed a memorandum of discharge of the mortgage and which released all the title deeds to Messrs Ellis and Company at the request of the advocates.

It is not clear how but Mr Milimo managed to register the assignment which the plaintiff had not signed and he got the title deeds registered in his name. He also took possession of the disputed property. When the plaintiff discovered this, he sued Mr Milimo in an action which went all the way up to this court and succeeded in cancelling the title deeds obtained by Milimo and regaining possession and his own title deeds.

The plaintiff then sued the bank claiming damages for the conversion of his three certificates of title in respect of his three properties which he claimed were wrongfully released to Messrs Ellis and Company contrary to the terms and conditions of the mortgage and which had enabled Milimo to carry out a number of wrongful transactions, such as surreptitiously acquiring a certificate of title to one of the plots, evicting the plaintiff's tenants and suffering the property to become dilapidated. The learned trial judge held that the bank had acted in breach of agreement as well as negligently when it released the title deeds to a third party without the consent of the plaintiff and without first clearing such release with him. He considered that it would have been prudent for the bank to have inquired from the plaintiff if he had authorized Mr. Milimo to redeem the mortgage before

they gave him the title deeds. The learned trial Judge awarded the plaintiff on his claims and as damages, the lost rentals of USD 1200 per month for the period in question, plus the amount claimed which was required to repair the property.

The bank has appealed to this court on the question of liability and on the awards which were said to be either too remote or unsubstantiated. Mr. Mabutwe filed a number of grounds of appeal. A major thrust of the arguments in support was to contend that the learned Judge erred in fact and in law when in effect he found the bank liable for a third party's wrongdoing simply because the bank had released the title deeds to plot 5044 Kitwe to a reputable firm of lawyers at their request after the third party had paid off the plaintiff's debt. Mr. Mabutwe submitted that the bank was an innocent party and was not in a position to foresee that the release of title deeds to a reputable law firm would result in their being put to improper use. The upshot of the submissions was that, if there was any negligence in releasing the title deeds to the lawyers, then the third party's subsequent wrongful and illegal acts could not be properly regarded as a direct consequence of the bank's alleged negligence. The damages suffered were, accordingly, too remote and the result of *nova causa interveniens* for which the bank could not at law be liable. Counsel relied on *Weld-Blundell v Stephens (1)* for these submissions. It was argued that when the third party changed the title deeds and when he took possession of the property, these were not ordinary and probable consequences of releasing title deeds to a firm of lawyers; these were independent civil and illegal wrongs committed by the third party so that the plaintiff should have claimed his damages against the third party. Mr Mabutwe submitted that the court below stretched the principle of vicarious liability or contribution by alleged joint offenders too far when it found the bank liable for the acts of the third party Milimo which were manifestly wrong.

Mr Matibini in response argued that the damages suffered were not too remote; but they were a direct consequence of the negligence of the bank and not the result of a *novus actus interveniens*. He pointed out that the third party was not privy to the contract between the plaintiff and the bank so that it was wrong to allow a total stranger to the loan to redeem the mortgage and to obtain the title deeds without seeking the approval of the plaintiff. Mr Matibini relied on certain dicta by Lord Reid in *Kaufos v Czarnikow Limited (2)* which contrasted the position in contract with that in tort and imposed a more extensive liability on a tortfeasor for foreseeable damage which results from the wrongdoing. Such dicta, it was pointed out, had been cited with approval by this court in a number of cases. Mr Matibini argued that the bank had failed in its duty of care when it released without authority the plaintiff's title deeds to a third party and must be liable for any damage which directly and naturally resulted from its failure to do its duty in respect of such vital documents. There were various other grounds and submissions which were perhaps not as central or as important as the ones we have outlined.

We have considered all that has been urged before us. The action was founded on conversion which is a wrongful interference, in this case, a dealing with title deeds in a manner which was inconsistent with the right of the plaintiff as the true owner. As Lord Porter observed in *Caxton Publishing Company Limited v Sutherland Publishing Company Limited (3)* –

“... where the act done is necessarily a denial of the owner's right or assertion of a right inconsistent therewith, intention does not matter. Another way of reaching the same conclusion would be to say that conversion consists in an act intentionally done inconsistent with the owner's right, though the doer may not know of or intend to challenge the property or possession of the true owner.”

Again, as the learned authors of *Paget's Law Of Banking*, 10th edition, assert at P. 271 –

“Liability for conversion is independent of the distinction between commission and omission, between the active interference with the property involved in the voluntary handing over of the goods to a person not entitled to receive them, and the mere passive neglect of duty which may result in their loss.”

The learned authors go on to observe at page 272 in respect of things left in their safe custody, (omitting the irrelevant) -

“The banker is primarily concerned to comply with the mandate pursuant to which he accepts the goods for safe custody. Where anyone other than the original depositor applies for re-delivery and cannot show his authority, the practical course would be to decline to deliver, but to this it is objected that the banker, if the application is genuine, is guilty of technical conversion of the goods, and that he would have to convince the Court that he had reasonable grounds for suspicion, and had acted bona fide; or else suffer damages.”

There are lessons to be drawn from all the foregoing since, quite clearly, sight should not be lost of the circumstances in which the title deeds came to be released to the ‘wrong’ people in the case at hand and even if, technically, such misdelivery resulted in a conversion. What the third party did after he had got hold of the title deeds undoubtedly caused loss in the sums awarded below. It also caused inconvenience since the title deeds had to be retrieved only after litigation. But from the point of view of the bank, here was a reputable firm of lawyers saying they were acting in a proposed conveyance and asking for the title deeds. It was not Milimo but the lawyers to whom the title deeds were released. Mr Mabutwe argues that a bank dealing with a reputable firm of lawyers would not know that something illegal would happen later and should not be held liable for such subsequent developments. On the other hand, Mr Matibini argued that while he would not wish to indict the whole legal profession, nonetheless the policy of the law should not be to grant immunity to breaches of trust by persons like banks carelessly releasing title deeds in breach of their duty of care to keep them safely and not to part with them without authority. The fact that there were lawyers involved has caused us much anxiety since quite clearly there is an equally important public policy consideration that persons dealing with members of an honourable profession like lawyers can safely expect to repose trust and confidence. There is no carelessness involved in taking the word of a lawyer as the bank did in this case. The bank had no reasonable grounds for suspicion so as to refuse to deal with the lawyers. In the circumstances, it was not negligence to release the title deeds to the lawyers who said they were acting in a conveyance and it was not negligence in such circumstances to fail to obtain clearance or authority from the plaintiff customer. The finding of negligence below can not be supported. The action, however, was one of conversion and if, for the sake of argument, it could be said - and we do not say so - that there was even a technical conversion by the alleged misdelivery of the title deeds, the measure of damages against the bank would not be that which was adopted below. As the learned authors of MCGREGOR ON DAMAGES, 16th edition, suggest in Paragraph 1418 -

“In actions for the conversion of title deeds, the Court may give as the measure of damages the full value of the estate, but to be reduced to a nominal sum on the redelivery of the deeds”

In this case, the true conversion took place at the hands of Milimo who even went on to take possession - which itself may have been a trespass - and to cause dilapidation. The bank was not party to Milimo’s wrongful actions who even went on to deprive the plaintiff of rental income and to get disputed title. The awards below were the direct result of Milimo’s actions but they could not be regarded, as a matter of causation, as having flowed directly from the act of releasing title deeds to a firm of lawyers who said they were to act in a conveyance.

The awards could only have been competent if it were legitimate to say the bank and Milimo were joint tortfeasors in respect of the latter's flagrant wrongdoing. The bank's own role, we agree, was quite innocent and they are not to be held vicariously liable for the independent and subsequent wrongful actions of the third party. We agree that the plaintiff has pursued the wrong "*offender*".

It follows from what we have been saying that we allow this appeal; reverse the Judgment below and enter verdict for the bank. Costs follow the event and will be taxed if not agreed.

Appeal allowed