



**IN THE HIGH COURT OF MALAWI**

**COMMERCIAL DIVISION**

**Lilongwe Registry**

**Commercial Case No. 171 of 2017**

**(Before Honorable Justice Manda)**

**BETWEEN**

**HLUPEKIRE CHALAMBA.....CLAIMANT**

**AND**

**KENYA AIRWAYS.....RESPONDENT**

**CORAM: A.Z. GUMULIRA ASSISTANT REGISTRAR**

Mr. Mulemba, of Counsel for the Claimant

Mrs Kondowe, of Counsel for the Respondent

Mr. E. Nhlazi, Court Clerk

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**Gumulira, AR**

**ORDER ON ASSESSMENT OF DAMAGES**

## **Introduction**

This order on assessment follows a hearing of proceedings for assessment of damages that was held pursuant to the Judgment of Honorable Justice Manda, delivered on 12<sup>th</sup> January 2018.

In the said Judgment, Honorable Justice Manda held as follows:

*“From the foregoing, I would thus enter judgment for the plaintiff on the basis of unlimited liability. However, it would be up to the plaintiff to then prove the full extent of her loss during an assessment hearing. The plaintiff is also awarded costs of this action.”*

## **Background Information**

The Claimant commenced this action through a Writ of Summons in which she claimed that the Respondent had breached a contract of carriage for reward entered into by the parties on the 24<sup>th</sup> of August 2014.

The contract had specified that the Respondent would carry the claimant and her luggage on the Respondent’s aircraft from London to Lilongwe of Flight Number KQ101/KQ730. However the claimant noted that the following items were missing from her luggage upon arriving in Lilongwe.

1. A Canon Camera worth US\$697
2. An external Hard drive worth US\$178
3. A flash drive worth US\$21
4. Channel perfume worth US\$258

The Claimant thus claimed the value of the lost property which in total is US\$1,154, damages for loss of use of the said items and costs of the action.

## **Issues for Determination herein**

A look at the Claimant’s pleadings will show that the Claimant sought the following reliefs:

- a. The value of the lost property which is US\$1,154
- b. Damages for loss of use of the said items to be assessed
- c. Costs of the action.

I do not subscribe to the Respondent's proposition at this stage that the Claimant's right to damages got extinguished two years after the said incident for failure to commence the action within the said two years and that therefore the court should dismiss the assessment of damages proceedings on the ground of want of jurisdiction to proceed.

This argument, I am afraid is misplaced at this stage because I believe the same was raised in the hearing of the substantive matter and the Judge went ahead to hold that this matter had not become statute barred and awarded such damages to the Claimant which were to be assessed by the court. The Respondent cannot therefore use the same argument as a ground for dismissing these assessment proceedings. I proceed to assess damages as has been done below.

The Claimant testified on the value of the items that went missing and the Respondents did not dispute the same through cross examination of the witness nor did they do that in their submissions. In my most considered opinion, we take it that the Respondents are not disputing the fact that the said items, worth **US\$1,154**, went missing in the ordeal. We therefore award **the sum of US\$1,154 to the Claimant**, it being the total value of the property lost. That deals with the first relief sought by the claimant and awarded by the Judge on 12<sup>th</sup> January, 2019.

It therefore follows that the following are the issues that remain to be determined by this court:

- Whether the claimant ought to be awarded compound interest on the total sum of the equivalent of US\$1,154 at 3% above base bank lending rate from 25<sup>th</sup> August to date of payment of the said sum as damages for loss of use.
- Costs of the action.

**On whether the claimant ought to be awarded compound interest on the total sum of the equivalent of US\$1,154 at 3% above base bank lending rate from 25<sup>th</sup> August to date of payment of the said sum as damages for loss of use.**

It is the Claimant's submission that damages for loss of use would compensate the Claimant for the period of the missing items and that the same can best be managed by an award of interest at the usual 3 percent above base lending rate hence the claim for interest herein.

It has been noted, and correctly so by the Respondents that the Judgment delivered on 12<sup>th</sup> January, 2019 did not award interest to the Claimant and that the claimant did not in their pleadings claim any interest. The issue of interest was only mentioned in the Respondent's final submissions.

### Reasoned analysis

Assessment of interest proceedings obtain only where an order for interest was made. In other words, where no order for interest has been made, no assessment of the same can be done. It is true that Interest has been held to be a form of damages (see **Sempra Metals vs. Inland Revenue Commissioners [2008] A.C. 561**, which means that **Order 12, Rule 19(1) CPR**, which provides for conduct of assessment of damages as a trial, applies to conduct of hearing of proceedings for assessment of interest. In my most considered opinion, this also means that the same must first be pleaded by the Claimant.

I believe that damages for loss of use of the said items in this case can very well be assessed in monetary terms without allowing the claimant to trump upon a well-established rule of procedure.

The Claimant's prayer for interest as done in their final submissions is therefore dismissed, not only because the same was not included in the pleadings but also because of lack of justification for the compounded interest claim.

On the evidence brought forward by the claimants, more especially the fact that the items were purely meant to be for the Claimant's use and enjoyment which she has been deprived of since the 25<sup>th</sup> of August 2014 to date, we believe that the sum of MK 150,000.00 will ably compensate the Claimant for the loss suffered.

### Final order

In summary, the claimant is hereby awarded the **sum of the Malawi Kwacha equivalent of US\$1,154 being the value of the lost property, MK 200 000.00 as damages for loss of use of the said items and costs of these proceedings** which will be assessed by the court if the parties fail to agree on the same.

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**A.Z. GUMULIRA**

**ASSISTANT REGISTRAR**