

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NO. 796 OF 2005**

BETWEEN

AUSTIN MUSYANI..... PLAINTIFF

-AND-

**WILSON CHING'ANDE t/a
CHING'ANDE & LAW.....
DEFENDANT**

CORAM: HON. NYIRENDA, J.

Mr Chilenga, Counsel for the plaintiff
Mr Ching'ande, Counsel for the Defendant
Kafotokoza, Court Interpreter
Miss C. Jalasi, Court Reporter

DATE: 30TH MAY, 2006

TIME: 9.00 AM

Chilenga: My Lord I am for the plaintiff. Theu for defendant.
I have just been served with notice of change of Legal
Practitioner.

Theu: I have been retained by defendant and filed notice.
Before filed notice I called my friend to seek indulgence for
few days. I got just only on Sunday the 28th of May, 2006. i
seek courts indulgence. I appreciate anxiety of court and
plaintiff but matter be adjourned to convenient date. Five to
six days would be enough to get ready.

Chilenga: I object to adjourn on two grounds.

- (1) Defendant is legal practitioner served by pony express on 13th May, 2006. Notice reached him on 19th May, 2006 a sit is hand delivered. It is now 10 days before Theu was instructed – there has been enough time. Matter was initially adjourned on 11th April, 2006. Defendant was aware that matter was ready for hearing since April, 2006. Adjournment is not in good faith but to delay proceedings.
- (2) There are costs . My client moves to Blantyre would make matter expensive. Plaintiff objects to hearing. There is with me affidavit of service.

Theu: Chilenga understands my position but for defendant's conduct. As to costs they be for the plaintiff. In any case matter was not going to finish today.

1st adjournment defendant realized he needs to be represented therefore refers to counsel.

Theu: Reasons for delay. Defendant looked for more particulars. He wanted counsel to have a proper brief. He was only able to do that last week end. Defendant attempted to talk to plaintiff's counsel for a discussion. Some of the claims could have been resolved.

COURT RULING

The defendant seeks an adjournment of the present case set down for hearing today. Counsel Theu on behalf of the defendant tells the court that he has just been retained and therefore needs to prepare.

A notice of change of legal practitioners has been shown to the court. This matter comes for hearing for the second time. This first time it was set down for hearing. It failed to proceed because the defendant was not ready. He did not even come to court. It is said he got the notice of hearing late. The court obliged and adjourned the matter to a date to be set.

This time around the defendant was served with notice of hearing on the 19th May, 2006 for a hearing set for 30th May, 2006. Only today the court is told the defendant has engaged counsel and therefore seeks an adjournment. Counsel says he was only instructed a day ago. He therefore has had no time to properly consult with his client.

I must confess I find the developments in this case rather unfortunate. The defendant is clearly trying his luck with this court and clearly is taking this court for granted. The defendant is himself a lawyer. He is well aware of what is required of him when he is a defendant in a case. That is why he decidedly took the defence himself in the first place. What is worse is that the defendant is not in court. This must mean he assumed he was getting the

case. I do not think there is reason enough for me to adjourn the case again. The matter will proceed in the absence of the defendant who is free to join the proceedings at any stage if he so wishes.

Made in Open Court today the 30th May, 2006.

A.K.C. Nyirenda

JUDGE

Chilenga: Case for plaintiff is for breach of tenancy agreement especially breach of clause to repair. There is a counter claim and skeletal arguments. There is no skeletal arguments from defendant. No statement at all which makes defendant case unknown. I will call 1st witness.

PW1 SWORN AND STATES IN ENGLISH

I am Austin Musyani of P.O. Box 123, Lilongwe. I am a banker. Defendant is a lawyer by profession. It was in January, 2002 when Ching'ande sought to rent my house. I have put in a statement of facts explaining my relationship with Tung'ande.

Court: Statement to be used by the court as statement of plaintiff.

I seek an agreement. I wrote the document to Ching'ande & Law on February, 2005. Summary of what Ching'ande

has to do when vacating the house. I signed and Ching'ande signed. Terms were 5 main areas.

- (1) Notice of termination of agreement
- (2) Payment of rent for two months covering period not settled
- (3) Payment of K28,000 for rent held by Ching'ande on account of settlement of water bills
- (4) Utilities to be settled by any party
- (5) House to be put back in state defendant got it.

I tender this document **Ex P.1.** It was assumed that he would carry out agreed terms and conditions prior to vacation of house. Unfortunately the house was not maintained. We realised this when potential tenants were refusing to take the house because it was in bad shape. I sent my wife, two children, two workers with materials including paint to Blantyre to carryout repairs. My wife Mrs Musyani went to Ching'ande office before carrying out work. The house was vandalized . There were no locks. Floor was bad, kitchen unit bad. Geyser licking, ceiling dropping. All entrance doors were locked except one. My wife started working after Ching'ande agreed to pay costs including labour costs for painting the house.

All materials were paid by me, because Ching'ande did not supply materials. On labour Ching'ande agreed to pay painter K12,000. He did not pay quickly I had to pay my own money and got it from him much later.

All electrical work outside the house was vandalised e.g bulb holders electric. Outside was completely deserted, grass not cut. Boys quarters nothing was good there. No lights, no maintenance , it was locked up and could not find the keys to it.

My wife contacted Ching'ande prior to maintenance. Mr Ching'ande was not personally involved, he used his administrator to sort out things on his behalf. But my wife got no help from administrator. Hence my wife did the job on the understanding that upon us submitting to defendant the costs he would settle the bill. All my wife was undertaking was communicated to Ching'ande. Our understanding was simple that the house would be put back to habitable state.

There were two stages to notice. At first I agree him one months notice. He refused and said he was paying rent for three months. He was entitled to three month's notice. I gave him notice because he was failing the pay rent. Then in the course of taking about three months that is how we came up with the document ex p1.

1. Escom bill were to be settled before he left
2. Telephone bills were to be settled. All telephone receivers infact were removed.
3. Water - before defendant went in I carried out repairs bills were to be high. Not necessarily because of repairs but there were linkages which were corrected, because

of vacation there were credits I would pay him back. If debit then he would pay. In this regard when he was vacating he withheld K28,000 from rentals because of water bill. It was this amount from which debit or credit to water would be sorted out. Defendant never paid for water bills and there were debits. No debits on power because it was prepaid.

- o I paid for water
- o Telephone is still outstanding
- o Power there was nothing

Document 30/05/05 letter I wrote to defendant. I was claiming maintenance money which he should have K332,487.20. I claimed all repairs outside ie bulbs, surrounding area, utility bills, claim for transport to and from Blantyre. Loss of income because house remained vacant for some time because of state of disrepair. Infact a lot of things are to be completed.

- I claimed two months at K45,000 per month - K90,000
- Utilities water - K61,550
- Telephone bills - K32,129.90

I tender this letter as part of my evidence. Ex P2

An earlier letter is mentioned that letter was not replied. This present letter was not responded to hence legal redress. Since I am not getting to replies from defendant I want court to assist me collect the amounts claimed which I spent to put

my house on habitable state. I also seek costs of this whole litigation – this matter would have resolved outside court.

It has taken me time from to collect this money. I seek interest on the money to date.

Counter Claim

I am liable to the counter claim, water bills were analysed and agreed upon with Ching'ande. Water bills were adjusted. Infact Ching'ande never settled any water. I owed Water Board the bills I owed were settled. In fact defendant surrender the K28,000 – that he withheld because I sorted out water bills. Water bills show he never paid for water.

When I was leaving the house water bills were all settled. When I was taking it overall the house K75 is what he paid prior to investigation by water board. Water Board credited the account by K101,000 – that is 100% so there was no bill. But as I was taking over there was a balance of about K52,000. I paid this amount.

K15 for electricity – I do not know how that comes about because the account was prepaid. That is why I am not claiming power. I found zero unit and I put in units top repair units. Extension was done in 2002. When doing maintenance we did not use his units at all we work day time. The defendant never talked about power, during my discussion with him.

There were a lot of other claims that I have left out – kitchen unit I bought it and fitted it. I did not claim. I replaced geyser and destroyed ceiling boards and never claimed that.

Cross - Examination

Tenancy was from 2002. It was oral agreement. It is 2002 and not 2001 but we talked in 2001 orally around December and he occupied the house in January, 2002. Agreement was oral terms were as per standard terms and conditions as per landlord and tenant. It was gentleman's agreement. Agreement was not vague though general in terms.

Date agreement to occupy was prior and occupation was in February, 2002. Usual and general terms.

- (1) that house would be left in habitable state upon vacation.
- (2) That all utilities would be paid for
- (3) Anything broken out not as a result of ware and tare they would be put in order
- (4) Surroundings would be maintained.

I was to do periodic checks and maintain **WARE AND TARE** be it inside and outside.

HOUSE: was not given back as it was. House was broken – house was vandalized. Bills were not cleared. Surroundings not cleared. These are some of the breaches although there

Before defendant entered house both myself and defendant inspected it. He could not have entered if it was **not** in a habitable state. In fact when I queried defendant about disrepair he never refused. There was no inventory. What would inventory be for – about clear walls?

Para : I am not claiming painting outside. But I am not claiming that but e.g garage which was outside was not looked after. Bulbs were not replaced and vandalized. This is exterior.

Letter of 30th May 2005 letter was hand delivered to defendant. It was sent through my employers. I confirmed with my office of delivery. I called Ching'ande's secretary and she confirmed receipt and giving letter to Ching'ande. I did not carryout repairs while Ching'ande was in occupation.

Property was handed over to my wife - 2005. **Prior Ex p2**
The defendant was aware. List was prepared after the repairs.

Outside: Grass was not cut. Whole outside was neglected. I did the outside. Ching'ande was actually involved. Infact Ching'ande employed clearers at K9,000. The people refused. Then my wife engaged others and we paid about K4,000 – Ching'ande agreed. We paid casual labourers and could not be expected to have receipts.

Utilities are electricity and water, and telephone bills. - Number is on telephone bill. I sent telephone bill to Ching'ande. Telephone Bill was as of the date of him leaving the house.

Source document on water is with Mr ching'ande. I thought if I gave documents to defendant that was good enough. I have not shown the water bill here. My wife went to do the inspection of house. Ching'ande partly participated and another person. There is time of inspection. Work was carried on for two weeks and we told Ching'ande about what we had done. At time of handover I contacted my lawyer. The list was prepared by my wife together with Mr Aufe the administrator.

Premises were owned by National bank. I had lived in this house myself. Defendant was first tenant when I moved out. I found tenant within a month. At time tenant moved in I had moved to Lilongwe. We only left watchman to look after the house. I cant remember whether it was myself or my wife who handed over. I can tell the state of house. At time I left all was well. I painted the house and repaired everything. It is possible a relation of mine handed over house to defendant. Payment was 3 monthly. First payment was six months because of one side of walls of fence was to be done. This is what I have referred to as construction works. I did whole tenant was in the house. Water from the same house. I don't know how much water I consumed. Ching'ande was to tell me how much. K28,000 was withheld towards this water.

defendant gave me back the money because water did not cost much.

Telephone: When I was leaving I left no bill. The bank settled the bills. Ching'ande was aware of this fact. We talked about. The bills and all utilities were paid. Ching'ande never came to me with unpaid bills.

Construction was a wall and did not require electricity. He never came to me with any bill. He came to me with only water bills. Construction was in 2002. No bill came from defendant. Agreement of 2005 came in because of the manner in which tenant was behaving. He was not paying. I drafted that for the way forward and he looked at it. He charged one or two stewards and we signed it.

Two months came in because he had already been in one months after notice to vacate. Then we gave him two months. He pays for the two month's notice. This was not arrears. Ching'ande paid the K28,000 - He also paid the rentals. He paid the K28,000.

Settlement was not done because when I went to him for settlement but he was not available to me when I went to him. He referred me to his administrator. I eventually got the bills from the relevant authorities. I sent them to him. He never responded.

Ching'ande was supposed to repaint the house. I took over

down to take over the house. My wife went to Ching'ande's office but was inspected with **Aufe**. My wife was waiting at Ching'ande's office for long hours she was never attended to. During repairs maybe Ching'ande was not there but **Aufe** was always there on his behalf. This was his administrator.

Ching'ande has never disputed anywhere that the house was to be repaired. - I did gate still works. Occasionally I visited construction. I used electricity from same house when Ching'ande was tenant. I cant recall how much. Defendant never raised a bill in the years he was there. I might have fixed water gully while Chng'ande was there. At some point water bill acquired credit K100,000 and this probably in 2004 because meter was faulty. Defendant paid for water while meter was faulty. - Ching'ande was credited for that.

My claim is based on letter submitted. That is a proof of my claim.

Re-Examination

I did not claim for maintenance while Ching'ande was in the house although I did that. That was settled and resolved. I am not claiming that. I am claiming what he did not do when he was leaving the house. - We did not do handover because Ching'ande decided to avoid me despite my going to him to Blantyre. He said at one point he was looking for an electrician to verify a few things but he disappeared from there.

Mr Aufe : He was the office administrator of Ching'ande and Company. My wife dealt with him more than Ching'ande.

17TH JUNE, 2006

PW2 FRANCES MUSYANI SWORN AND STATES IN CHICHEWA

I am Frances Musyani I have a statement. I wish to adopt it. I maintained the house after defendant had vacated it. It took me two weeks. The house was in a bad shape. Initially I thought it would take us 4 days because we thought it would only require painting only. But because of other things were not alright. Main bedroom toilet not working, cover not there, window fixers were not there. Curtains rails were not there. Bulb holders were not there. Phone receivers were not there. Spare keys were not there. Other doors literally had no keys. We called Mike Trading to come to do the work. Geyser was leaking. Ceiling was damaged because of linkage. Rats had damaged kitchen unit. Tiles had been removed. Main door had no padlock. No keys to padlock. Security lights outside were not working. Clothes line was cut one pole was not there. A lot of grass outside and we used ordinary labourers. We paid K4,500. I fixed garage the inner lock was damaged.

I explained to Ching'ande and he sent me two locks which I fixed to the house. This is the quotation from Welding Centre dated 23rd May, 2005 of various items worth K14,000 plus. **Musyani went to pay Mike Trading K14,000 plus.** I went

to see the fixing of the door briefly and left them continue with the work.

Telephone Bills: - It was Musyani who is conversant with that. I was more concerned with fixing of the house. House was badly damaged. The garage was most damaged. We painted garage late because his car was still there. We painted it after defendant removed his vehicle.

Cross Examination:

At the time we left the house it was in good shape. I know the state of the house when defendant left it. House was left in December, 2001 and defendant went in February, 2002. My husband had been posted to Lilongwe. We left relatives in the house. One of them was cousin to my husband. There was Mr Msukwa. There were two boys in the house. I was not there when the house was handed over to defendant. The house was painted before defendant went in. I went to see the painted house in January, 2002 end. I went to Blantyre in April, during Easter holiday soon after closing schools. I can remember the exact date but it was during Easter holiday. I went a day after closing schools and went there for two weeks.

Musyani was one who was dealing with defendant not me although I used to visit the house once in a while in the company of Mr Musyani. - this happened twice or so. It was my husband who used to visit the house. I would not say why

In January 2002 it was the two boys in the house. At that time I did not know that it was Ching'ande who was going to stay in the house. I went there January, end. I can remember if the defendant went in end January. I am not sure of the exact dates in January 2002 but I went there in January, 2002 after finishing painting the house but at that time defendant was not there in the house.

30th May, 2005 I can't remember where I was. I don't know how relevant that date is to this case. This document is bills for the house. I knew about these bills before 30th May, 2005. after finishing repairs that is when this document was prepared about maintenance of the house. I first saw this typed document on 30th May, 2005. it was typed by Mr Musyani. Before this document I am the one who had written down what I had bought and gave that to Mr Musyani who then typed this document on the basis of what I had given him.

When I went to Blantyre I went to Ching'ande's office someone there told me that keys were at the house. I thought defendant was already out of the house. Musyani talked to defendant about my going to Blantyre. I was going to Blantyre to paint the house. As to when defendant left the house it is Mr Musyani who knew. He did not tell me about hand over. He just told me to go and paint the house.

I thought it was I was to merely paint the house because I

there were a lot of things that were not in order. I went to the house with boys (2) to paint the house. I wrote down what had gone wrong. I called Musyani to tell him that house was in bad shape. I asked him to come alone to deal with the situation. Musyani called defendant and defendant came and found me at the house and he said he did not see why I had to call plaintiff about the situation. I repaired the house because defendant refused to buy the items for us.

I used to go to defendant's office but he used to refer me to his officer Mr Aufe. I could call him but he never answered me. Mr Aufe would not assist in some cases because he said he was too junior. Aufe bought some of the things for us eg:

- o Sitting room glass
- o Two locks
- o Plumber repaired one toilet
- o Rim locks (3) were repaired but there were no keys
- o One door was repaired
- o I am told painters were paid by Ching'ande
- o One carpenter came sent by defendant
- o He sent plumber but he repaired one toilet in the main house and one in servant's quarters.

The plumber and carpenter was being specifically told by defendant what to repair. They were not under me. I gave food to those two people who were sent by defendant. Plumber requested transport money.

Carpenter to me was to work on the rim locks, damaged doors, curtain rails, drawers in kitchen, garage doors, ceiling. Carpenter worked on damaged door and two locks. I told him some items had not been done but he said they had done what they had been told to do. The door was properly done. Defendant came to the house while I was there twice. I told defendant what had been damaged. He said he knew. I went to Blantyre to paint the house but was forced to repair damages for the house. I fitted a few new things to the house but those are not on a list. Eg. Wall to wall carpet in the bedroom and also a kitchen unit was infact badly damaged for us to decide to replace it. We told the defendant to repair it but we noticed that until my last days there was nothing being done. The carpet in the bedroom was fitted because the floor tiles had been damaged. I paid for the repairs. Mr Musyani sent the money. I paid more that K300,000. it was being sent piece meal. It could have been more than K300,000 part was for food, fuel etc. I am the one who used the money at materials etc. I was not present when defendant was going into the house. I went to meet defendant twice. First time was to get keys and second time to tell him of damages to the house. Main house took us 3 days to finish painting.

COURT RESUMED AT 2.00 PM

Ching'ande came to the house three times at the time of repairs. We went around the inside of the house with Mr Ching'ande. We identified what needed to be repaired. I

as stated before. He did not assist repair the main bedroom. He did not assist with bulb holders, toilets, security bulbs etc Telephone receivers. There was a broken telephone receiver but the other was not there at all.

Both laundry door and main door were damaged and defendant did not repair these. We changed locks in order to have main door with locks with enough keys. The lock on the main door where there was only one key was moved to inside. Main door had a chain lock which we had put there because we had a theft before. But the lock to the chain had keys that we left there we did not find them.

There was Mr Kapunda who worked on the house brought by my husband. He worked on the main door which he removed to fit another???? Kitchen burglar bar was put there by us ie on page 2 of statement. We left locks on the bars with keys but the keys were lost so we forced to removed the bar to open the door.

We placed all the pad locks. We replaced all the door locks except for one or two. The locks that were there had no keys. We asked for keys defendant said he would give them to us. He never did. Kitchen tiles had been broken we placed some of them. I can't remember how many were replaced. Somewhere not even there. Total not more that 10 tiles. It was the bedroom floor that was damaged. House has no dressing room. When we left the house defendant came in two months later. It was rain season. There could have grass

in. **(Observation by court) (defendant could not have occupied the house with all the faults that were found at the time of his vacation. Or had he????)**

When we went to the house we saw someone going away with pole like the linen wire pole. My husband did not talk to one about security arrangement. When we arrived still found defendants workers still removing defendant's property from the house. We tried to get defendant to hand over the house to us but on the arranged day he did not come. We waited at the house till late. I don't know if the house was eventually handed over.

RE-EXAMINATION

Defendant occupied the house end of January, 2002. we left December, 2001. house was in good state. It only required painting. In April, 2005 the house was not in a good state. We carried out maintenance of the house. It took me two weeks to do so. Defendant dealt with my husband and my husband would ask me to go to defendant's office for repairs. He did not assist me. At the end of two weeks I had finished most of the repairs.

PW 3: BENSON CHIKWATU SWORN AND STATES

I am Benson Chikwatu and I am a builder and painter. I made a statement which I tender in court. I worked for Mr Musyani. He bought paint from Dulux and together with Mrs Musyani we went to Blantyre. She showed us the inside of house

were bad, garage was bad, door for wardrobes were damaged. Kitchen unit had been eaten by rats. We repaired these and we painted. We stayed three days. There was a vehicle in the garage. We waited until it was removed by the person who was staying in the house. Because the garage was too bad we started by cleaning the room before painting. Ceiling was damaged because geyser was leaking. When we got there the outside of the house was bushy. Mrs Musyani knows who cut the grass. I was paid K12,000 for the job by Mr Musyani. We painted the outside of the house. We also paid K12,000 for the outside painting by Mr Musyani.

CROSS EXAMINATION:

I can not remember the dates but it was in April, 2005. Musyani engaged us to paint the house. He gave us paint. It was good quantity. I can't remember how many gallons but it was oil paint and PVA paint. He gave us paint with the wife to go to Blantyre to work. I did not know size of the house then. I started work. We charged for the work labour after we had done the job. I am a painter and bricklayer. I don't know how much materials cost. I was not there when materials were bought. There was someone who came and was talking to Mrs Musyani. He then said to me that he was the one who was going to pay us for the work. But it was Mr Musyani who paid me. All the work cost K24,000 and I was paid by Mr Musyani.

I wrote K12,000 in my statement I forgot to mention the other K12,000 but we painted the outside and also roof, roof was painted before. I was paid K24,000. I received it without issuing a receipt . I got the money here in Lilongwe at National bank. It took me 4 days to paint outside and inside but the whole job took us 2 weeks because we had to wait at same point. We left Blantyre together with Mrs Musyani. It took longer because there were other repairs being done and we waited to paint these parts as well. We did not suggest what else needed to be done. We only did what we were told. The first day we did not do anything. We started work next day. When Mrs Musyani was showing us around it was only me, my assistant and Mrs Musyani. We inspected house then started working. There is nothing else that I did apart from painting. **(Man simple but composed high not have followed questions to carefully assess answers.)** Charges were discussed with Mr Musyani. I never asked for K18,000 from Mrs Musyani. We charged Mr Musyani upon inspection of job to be done. Mrs Musyani gave us accommodation in the house and was also giving us food.

RE-EXAMINATION

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We used oil paint white, we used furnish, we used PVA paint, we used roof guard red, we used oil paint red, and we also used oil paint black., The paint was from dulux I only know Mr Musyani and Mrs Musyani with regard to this job. I saw the house before painting.

DATE: 12TH - 13TH DECEMBER, 2005

TIME: 9.00 AM

CORAM AS BEFORE:

DW1 JOSHUA AUFU SWORN AND STATES

I am Joshua Aufu of Box 365, Mangochi. This is my statement signed on 14th July, 2006, statement to be used in the case. I adopt the contents.

Document 1: Authorisation from Tung'ande and law to pay Mr Mwavu who had slashed at Musyani's house. There was grass at the house where Tung'ande was staying. Work done on 22/01/05. the owner of the premises was in Lilongwe. I do not have original here. Doc not clear but it is to Mwavu - there is cheque number. Mwavu was to sign in the cheque. We will arrange to procure original.

Chilenga: I object we need original, it is not legible.

Theu: Document be marked

Court: document marked IDD1 subject to production of original. Tung'ande wrote this document.

Document 2: payment requisition in support of 1st document. I was to see these documents before being taken to Mr Ching'ande. I was working as an administrative assistant. So documents came to me. This document was to show we paid for the work. I saw it when it was written. I took it to Ching'ande to raise a cheque. I do not have the original.

Court: Document marked as IDD2 subject production of original.

Document 3: receipt by Mwavu for receiving money. I am the one who paid out.

Court : Mark it IDD3 subject to original being produced.

Document 4: Condition of a property when Ching'ande was vacating the house. House was managed by Knight frank. It was to certify that the house was in that state. This was a different house which Ching'ande was to occupy. This is to show that had Mr Musyani's house been inspected in this way we would not have problems we are having now.

Theu: Document not for substance or contents but shows the importance of having an inventory. I wish to tender it.

Court: I will not allow this document.

There was no arrangement made when Ching'ande saw... he talked to Musyani by phone. We went to see premises. We found a Mr Musyani's cousin - he was the only person at the

grass that needed slashing. House was occupied by Ching'ande as it was. This guy actually gave me the keys. He did not take me around. He left. That house was in order we accepted the house as it was. **IDD4**

Document 5: is a payment requisition for water after there was a disconnection. This requisition was raised by me to discuss water bill. It is said there is money to be paid which Mr Musyani paid. This is to show we had been paying water bills. This was for period from when we went in to the time we went out. Bill was not in our name. later bill was in our name. we changed but I am not sure when it was changed. **IDD5**

Document 6: Enquire report we wanted to see how bills had been coming in. I went to get print out on 13th January, 2003. we were surprised with high bills because there were only 3 people in the house Ching'ande, wife and child. I spoke to Musyani about the high bills – he advised me check with the National bank to see payment record. National Bank said they had settled all bills before we went in. so the rest of the bills were ours.

Document 7 : is same document but now has markings para 19 of my statement says after we paid and I talked to Mr Musyani and he sent me to National bank. We also agreed that if there be problems I should fax him or talk to him. I faxed to him. National bank settled the bill of **K31,341.37**

Then there is settled by Ching'ande. I faxed document to Musyani because he asked me to do so. He confirmed receipt **document marked IDD6.**

Document 8: same document as IDD6 shows when document that was faxed to Musyani but IDD7 now includes fax report.

Document 9: is a letter to Mr Musyani of 10th February, 2003 I wrote this letter. I tender this. Mark it IDD8

Inquiry was for the period from October, 2001 to December, 2002. we occupied house in February, **2002.**

Document 10: Letter sent to us by Mr Musyani of 29th May, 2003 by fax. Letter was going to water board Mr Musyani wanted us to know that he was discussing with water board about the problem. We were withholding Musyani's cheque until issue was resolved. **Marked Ex (9)**

Document 11: This document was faxed to us by Mr Musyani after he discussed with water board. - this is an inquiry report which Mr Musyani got. It came with **Exhibit 9(a)** to be marked as **Exhibit 9(b)**

Document 12: I wrote this letter to water board we were agreeing with what Mr Musyani had said. We agreed with Musyani that there was something wrong with their billing system. There were no leakages. I tender the letter as

Document 13: I went to water board after Musyani had done his part to try and rectify a problem. Water board was in a disconnection campaign. We are asking water board in this letter to stall disconnection until Mushani paid his part on top of what we were told ... average bill. I tender it as **Exhibit 11.**

I was responsible for managing this property for Ching'ande and law. Ching'ande was the one who was there at the handing over the property. I was at the office. Ching'ande is the one who would know about the handover. What happened at the end was that Mrs Musyani came to our office to say she wanted to paint the house.

Theu: I have not been to resolve issue of originals. We have agreed with Chilenga that we produce originals later. We have agreed to proceed to the next witness. Explain the absence of those.

CROSS EXAMINATION

The statement says I worked for Afiatu Agencies a property agency. I was working there. The landlord prepared inventories. We asked Musyani about it she said there was no need. To him property was in order. There was need to do something to the house. House was let out of friendly terms. Musyani did not want it. I did not prepare an inventory for my own use. I would say it was necessary in event of despite we

outside and lack of fence in front, security would have been a problem.

At vacation two sides had fence front and rear. We had no problems with interior of house. We left interior in the manner we found it. One phone hand set was not there, other went missing. It missed when Ching'ande was in the house. Phone wiring was intact. System was alright except for receiver. I checked it together with Mrs Musyani. We saw that the lines were there but not whether the lines were working. In any case at that time the phone were not working. Phone was probably disconnected because there was an outstanding bill. I don't know how much it was. We never used the phone. I did not settle a phone bill. When we went in there was no line. I don't know that there was a working phone at the house. The bill of K158,952.17 was outstanding.

Agreement – tenant was supposed to pay phone bills. Water bills have been explained. We never paid water bill for almost a year and bill came to K73,000 ++++. It is about K6,000 a month for the year. That was exhibit IDD5. There fluctuations in the consumption was sky rocketing. It was fluctuating. It would depend on many factors, visitors etc. I would not tell how Ching'ande was using water, but I would insist there was anomaly looking at people living in the house. Account was credited by K110,000 which was used by Mr Ching'ande. I have no records of the bill at the time of vacation. I would not tell if there was an outstanding bill.

I only saw people painting I don't know who brought paint. I did not buy paint. Ching'ande did not. Chikwatu painted the house. I heard Mr Musyani told Chikwatu to paint the house. Ching'ande vacated house end march, 2005. between March-April, 2005. I last paid Mwavu for cutting grass in November, 2004. This was not the last time we cut grass. We cut grass later we did not. - at time of vacation we did not cut grass. At the time of vacation we fixed all broken things in the house. At the time we went round with Mrs Musyani there were things to be maintained. Plumber and carpenter would know what was maintained. I was happy with the maintenance. I did not supervise maintenance work. I am aware of claim by Musyani on the house. I am not sure how long it took to maintain the house but it was within 3 days.

Tenancy terminated after the painting was done. Around 15th April, 2005. Tenancy was to end in February but eventually it was over in April, 2005 when Musyani allowed Ching'ande to stay on. there was no specific date of expiry. Rent was paid for all the stay. I am not sure if maintenance went on to May, 2005.

I know why kitchen unit was replaced. They wanted it to be in the way it was. There were some minor areas that were to be maintained but Mrs Musyani said she wanted a different units altogether. Yes the unit needed some attention.

RE-EXAMINATION

Inventory is necessary to determine state of house at

not want inventory because he said it was a gentlemen's agreement. I insisted and Ching'ande insisted but Musyani did not find it necessary. On entry three sides had no fence security. secondly there was grass - there was no proper handover of the house to us. Interms of painting it was done and we only paid labour. We wanted to paint the house but we could not resolve the matter but Musyani wanted dulux paint. We did not want to get that.

Handover was with Mr ching'ande. There were two phone handsets. The phone never operated. I don't know why. I handed over one phone. There was abnormality. It required to did the ground. At time of vacation bills were still high. That is why water board advised us to pay a certain minimal. When we complained and Musyani also complained water board gave us credit.

Page 12 of my statement Musyani insisted on dulux paints and that if we did not buy dulux paint he was going to paint the house. We were only asked to pay for the people painting we paid painter K12,000. Chikwatu was a painter hired by Mrs Musyani. At vacation there was long grass. Mrs Musyani said she had found someone to cut the grass. We had our own who were cheaper. They would have charged us K2,000. she got people who charged K4,000. From time Ching'ande and Mrs Musyani found plumber and carpenter to do the job I was not involved. Maintenance could not have over K300,000.

I am aware of a claim of K300,000. This is not right. House was done and inspected. Repair work was from 12th-15th April, 2005. Mrs Musyani could not have been working on the maintenance until May, 2005.

- o Plumbing was one day
- o Carpentry was one day
- o Painting was one day

On vacation Mushani gave Ching'ande a breather. Kitchen unit doors needed to be done. We were ready to do the unit. But Mrs Musyani wanted it replaced altogether with what they had in Lilongwe.

Proper documents

- o IDD1 – Exhibit D1
- o IDD2 – Exhibit D2
- o IDD3 – Exhibit D3
- o IDD4 – Exhibit D4
- o IDD5 – Exhibit D5
- o IDD6 – Exhibit D5
- o IDD7 – Exhibit D6
- o IDD8 – Exhibit D7

Court adjourned to 2.00 pm

Court resumed at 2.30 pm

DW2 MR. A. CHITENJE SWORN AND STATES

This statement is mine signed on 14th June, 2006. it is my evidence. It was translated into English. This is an invoice for payment of a job I did for Mr Musyani. Mr Ching'ande told me to do the job. Invoice was sent to Ching'ande. I was paid by Ching'ande. Invoice is dated 16th April, 2005. I tender it.

Exhibit D12.

This is another document to Ching'ande I tender it. **Exhibit D13.** I did carpentry work at the house moved from by ching'ande. Mrs Musyani was there. I finished the job I was to do.

CROSS EXAMINATION

I was employed by Mr Ching'ande. I was asked to repair damaged doors 4 or 5 doors if not mistaken. I worked for 3 days. – yes 3 days – why it took 3 days – it is because ward ropes locks were missing and had to be replaced. House had several places to repair. Aufi saying house was alright I would not say what he meant but I did what I was requested of me.

I found painters on second day of my being there. There was one vehicle of Ching'ande in the garage. I removed front door and kitchen door locks. I removed kitchen lock to the front door and vise versa. I was knocking off late and that time Ching'ande would not be there. I reported to Ching'ande after I finalized the work. I don't know if front door was fixed by Mikes Trading after I left but I did not witness that. I repaired all the damage. I was not told to fix the kitchen unit. I only

RE-EXAMINATION.

I worked on doors that is what I saw as damaged. There wardrobe locks – they were taking long to find. – that was what delayed me. **(did he work on doors or locks or wardrobe door locks)** I changed locks because Mrs Musyani asked me to. Mr ching'ande was inspecting my job and Mrs Musyani. I had no problems with Mrs Musyani. She accepted the quality of my work. The Brown and Clapperton door all I did was to change lock. At kitchen there was FBM door. Front door was B & C door. Mrs Musyani asked me to work on the two doors only. This was on the last day.

Court work:-

- o Two doors (front rear)
- o Toilet doors
- o Wardrobe doors
- o All doors in the house locks.

*** all doors I worked on because they were damaged. I worked on two wardrobes. There were two doors. Infront I removed lock from B & C door. I worked on both.

Court: case adjourned.

23RD JANUARY, 2007

My details are as per my statement submitted. I am the one who signed this document. I adopt my statement. I know Mrs Musyani. Mr Ching'ande sent me to work at her house. Plumbing. I worked on 2 toilets. Corridor and master bedroom toilet. Servants quarters, kitchen and other places as per my statement. AM1 and 2 are invoice and payments by Ching'ande for the work. I signed both documents. I tender them subject to availability of originals. **Exhibit 14 and 15 ??? Originals to come.**

Ching'ande used to call me before. There were several problems in the house. Meter was over charging. I explained to Ching'ande to ask that I do the pipe to rectify the problem. I did not do the pipe.

CROSS EXAMINATION

I went up to std 8. I wrote statement myself and sent it to lawyer. I was answering questions in Chichewa. I understand the statement. I worked on all the things in statement in one day. I was working at K155. I went to work at this house on a week end. I am trained on this job. At the time I went to work on house there were the only jobs except the geyser. Toilet cover was not there. We looked for one. We failed to get originals but got something different but they were able to cover the toilets. The toilet was ceramic but we got a plastic cover which was not the correct cover. When I was leaving we inspected the house with Mrs Musyani and confirmed all was well. I did all I did the geyser which required to be replaced.

I went to fix the house in 2005. it was in May - I cannot exactly remember the date. The damage to the house was not severe. I showed the problems to Mrs Musyani. We went around the house to identify problems with Mr Ching'ande and Mrs Musyani. I was employed by Mr Ching'ande. Ching'ande gave me food. I was not interested in the ceiling but I checked the geyser and ceiling around it. There were two places where water from the geyser were dropping. I am aware that ceiling boards are to be replaced.

RE-EXAMINATION

I trained as a plumber at home. My father did the same job. I learnt from him. I also go to Soche Technical School. The outstanding work for a plumber was the geyser which was supposed to be replaced. It was leaking because the copper container was rotten. Ceiling had spots of water drops from the geyser. House was inspected by me and Mrs Musyani. To decide what to buy. We did not find tamper for the system. We could not get ceramic tamper the one that you use to close the system.

Theu: Statement from Ching'ande has only been brought today for reasons beyond our control. We need 30 minutes. My apologies. We are ready to proceed and we bring in supplementary list of documents. They were not lifted. Application is oral.

Chilenga: I strongly object to this application. It is bad enough that the statement of witnesses is coming in only to

bring in new documents by an oral application at this stage is extremely unfair to the plaintiff. We object to these documents being brought.

COURT RULING:

It is indeed unfortunate that the defendant can make the application that he now does. It is now very clear to this court that the defendant is tying his luck at every stage of the proceedings to delay the proceedings. This court made very strong observations on the conduct of the defendant in its ruling of the 30th May, 2006 and would have expected the defendant by now to take heed of the courts observations and concerns.

Surely this application to bring in new documents today is a further mockery to the process for three reasons.

The first reason is that there is hardly any explanation why the defendant who himself is a lawyer is so casual about the matter so much that since the 30th May, 2006, when the court expressed concern about his laxity and lack of diligence in coming forward prepared, it is only today at this hearing that the defendant has brought his skeletal arguments. There has been no explanation for the delay. Mr. Theu of Counsel in fact was himself concerned that this client was not forthcoming with his own statement.

Secondly I should also observe that the manner in which the defendant is bringing in his exhibits is most unsatisfactory and would ordinarily not be allowed. Every time the documents were being introduced the originals were not available. The originals were brought much later and there was no reason given why they were brought in the first time. Thus the court has gone out at its way to accommodate the defendant.

the court allowed. There is no explanation why the documents that are coming in now were not included in the first list and even the supplementary list. Counsel has not given the court any convincing explanation. In fact some of the documents that are being brought in now are letters or documents emanating from the defendants own office.

Unless the court intervenes and makes a point it is becoming clear that the defendant wishes to have his way to protract these proceedings because as it is the plaintiff objects to the new documents because obviously he needs time to look at them if the court were to allow them against his wishes.

In the totality of these observations and for the reasons given the additional documents sought to be brought in now by this oral application are rejected. The case will proceed with the documents that were listed already.

Made in open court this 23rd January, 2007.

Nyirenda A.K.C.

JUDGE

23RD JANUARY, 2007

Theu: It is the respondent's view that in the light of the court's ruling it is difficult for him to proceed with his testimony. On his statement there are two issues to high light.

- (1) The situation we are in is not what the court intended and we seek clarification. The situation is that we have witness statements submitted today which was accepted. Having accepted the statement to which were documents attached I wish to regularize the

This acceptance was not conditional ie accepting of the statement with the documents.

(2) What does respondent do in this situation of ruling stands subject the court guidance which affects defence. If it came to that defendant will seek appeal.

The statement itself is not an application for supplementary list of documents.

COURT RULING

The position of the court is very simple. The witness's statement in itself is not an application to bring in additional documents. The fact that the court allowed the witnesses statement, which as said earlier comes very late, does not mean the defendant should bring with it the documents that are mentioned there. We all know that new documents that can only be accepted upon an application to do so. That application was made this morning and it was rejected by this court for reasons given in the earlier that I made this morning.

As for leave to appeal I really do not see any good ground for me to grant leave. The defendant's conduct in these proceedings as observed earlier demonstrates laxity almost calculated to delay the proceedings. The proceedings are almost at the end with the defendant himself as the last witness having called three witnesses before. This matter must be finalized. Leave to appeal is therefore not granted.

Made in open court this 23rd January, 2007.

Nyirenda A.K.C.

Court : This is the end of this case the respondent having declared not to give evidence. Submissions within 14 days.

Court: resumes this afternoon 2:15pm

Theu: Respondent who is to testify discussion has not taken us to anywhere. It is difficult for respondent to proceed. I need to was with respondent further. I need 7 days. I am unable to conclude certain matters with client. Adjourn is at discretion of court.

Chilenga: My Lord my prayer for adjournment is unfortunately and without legal basis. Court has ordered that we proceeded and leave to appeal has been rejected. Defendant wants to defend this case to protect costs.

Court: It would now very clear to this court that the respondent has really tried his luck with this court. Having made the rulings which I made clear and simple and having set aside this date of hearing which the respondent must have been well aware of and having accommodated the respondent in many ways in this matter. This application for and adjournment to me is not sincere. I reject it with the .. it deserves. The court is really to conclude the proceedings.

Made in Open Court this 23rd day of January, 2007.

Nyirenda A.K.C.

JUDGE

Theu: My Lord my client will not testify. On that basis I equally have no further infraction to proceed the respondent's case.

Court: This is the end of this case the respondent having not to give evidence. Submission within 14 days.

Nyirenda A.K.C
JUDGE