



THE REPUBLIC OF MALAWI

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

BETWEEN:

AUSTIN MUSYANI

PLAINTIFF

-and-

**WILSON K.A. CHING'ANDE t/a
CHING'ANDE AND LAW**

DEFENDANT

CORAM: HON. JUSTICE A.K.C. NYIRENDA, J

Chilenga, Counsel for the Plaintiff

Theu, Counsel for the Defendant

Kafotokoza, Court Interpreter

Jalasi, Court Reporter

JUDGMENT

The plaintiff seeks damages from the defendant for breach of terms of a tenancy agreement in respect of property known as LK 224 Mombo 9 in the City of Blantyre. The defendant denies liability and has counter claimed. By his writ endorsed with a statement of claim the short of the plaintiff's case is that at the

end of the tenancy the defendant left the house in a state of disrepair forcing the plaintiff to incur a total amount of K332,487.20 in repair costs and cost rental. The defendant counter argues that he was in fact compelled to an extra expense to keep the premises in order and counter-claims the sum of K180,000.00.

To summarize the facts of the case for the plaintiff it is stated by the plaintiff himself that the defendant occupied the premises in January 2002 by an oral agreement. The discussions had started much earlier around December 2001. At the time the defendant occupied the premises the wall fence was not completed. It was completed while the defendant was already in occupation. Otherwise the house was inspected by the plaintiff together with the defendant before he occupied it.

In the course of the defendant's occupation there was one major problem. The water bills for the premises were too high. This was a problem which the plaintiff as well as the defendant were aware of. Both the plaintiff and the defendant engaged in protracted discussions with Blantyre Water Board as well as between themselves. According to the plaintiff this matter was eventually resolved and the huge amount owing on the premises was credited to the premises account. To explain the matter further the plaintiff told the court that because of the anomalies with the water bill the defendant withheld K28,000.00 from the

agreed rent but that this whole amount was paid to the plaintiff when the issue was resolved with Blantyre Water Board.

According to the plaintiff misunderstandings between him and the defendant came at the time the defendant was to vacate the house. Apparently the plaintiff decided to terminate the tenancy agreement and he gave the defendant one month's notice. That seems to have presented the defendant with some difficulties because according to their oral agreement the defendant was paying three months rent in advance. To the defendant that meant notice of termination could not be less than three months. In their discussion the two solved that notice of termination would indeed be three months.

It would appear at this point the parties did not feel safe proceeding on the oral agreement alone. Their discussion was reduced to writing. Exhibit P1 is a letter from the plaintiff to the defendant containing the tenancy agreement which was signed by both parties. It is as follows as:

C/o National Bank of Malawi Limited
P O Box 123
LILONGWE

Ching'ande & Law
P O Box 2763
BLANTYRE

February 1, 2005

TENANCY AGREEMENT

Following my earlier letter of termination of tenancy agreement on the house at Namiwawa and subsequent discussions held at your offices on 1st February, 2005, it has been agreed that:

- a. The notice period for termination of the tenancy should be three months as from the date of my said letter, 30th December, 2004 ending 31st March, 2005.
- b. The rent for the two months (February and March, 2005) remaining unpaid for and now due should be paid on 1st February, 2005 covering the said two months.
- c. The MK28,000.00 previously withheld by the tenant on previous rentals on account of unconventional utility water bills covering among others, the period the landlord was carrying out construction works on the property be paid now together with the two months' rentals payable on 1st February, 2005.
- d. The issue of water and telephone bills and any other utility bills will be settled by the parties hereto on or by 26th February, 2005.
- e. The house interiors should be well maintained and painted by 31st March, 2005 as per tenancy agreement.

AUSTIN MUSYANI

CHING"ANDE & LAW

Signed.....

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At the time the defendant vacated the house there was no handover. The premises were not immediately inspected by the two parties together. Upon the defendant's vacation the plaintiff went to the house and according to him the house was in a state of disrepair. Infact the plaintiff described the house as vandalized. He immediately engaged the defendant who became uncompromising. It is said the defendant did not want to meet the plaintiff to discuss repairs.

When it became obvious to the plaintiff that the defendant was avoiding him the plaintiff decided he would go ahead with the repairs. The plaintiff was at that time living in Lilongwe. He decided to send his wife to Blantyre to do the repairs but nonetheless instructed her to go to the defendant's offices first to inform him of her mission and possibly to get the defendant's cooperation.

The wife subsequently reported to him on the difficulties she was experiencing in trying to get the defendant's full cooperation. It was decided that she goes ahead with the repairs. The wife indeed went ahead with the repairs. The plaintiff provided the money as requested by the wife to buy whatever was required. At the end of the whole exercise the wife had listed down all the maintenance work together with the cost of the items bought. The list was handed to the plaintiff who on the 30th of May 2005 wrote a letter to the defendant containing the details of the repairs and demanding reimbursement. The letter is Exhibit P2 and it contains a long list of items detailing repairs to virtually every section of the house including the guest wing and the garage. The total amount which includes loss of rentals during the time of repairs and utilities is K332,487.20.

The actual work was done by the plaintiff's wife, Frances Musyani Pw2, in the company of their two children and two workers whom they brought from Lilongwe. Frances Musyani's testimony was very brief and she spoke about what she did and

basically about the repairs she undertook at the premises. She said the repairs took her two weeks. When she arrived in Blantyre she went straight to the defendant's office to explain her coming and so that she could be taken to the house for it to be opened. She was not able to see the defendant but she was told that the keys were at the house with someone. She proceeded to the house and while there she realized that the damage to the house was more than she anticipated. She went back to the defendant's office but again was not allowed to meet the defendant. Instead she was referred to Mr. Aufi, an employee of the defendant to whom she explained the nature of the damage to the house but Mr. Aufi did not assist much. Realizing she was not going to get much assistance from the defendant she embarked on the repairs. In the course of the repairs she continued to go to the defendant's house with the hope of meeting him. She also tried to call the defendant but he did not answer her calls.

Eventually the defendant decided to come to the house and met Mrs Musyani. Together they inspected the entire house and were able to identify the areas that needed repair. After that visit the defendant came two more times. In the course of the three visits the defendant assisted with a few items that were required. He also instructed Aufi to bring a plumber and a carpenter to do some of the repairs. These people however had specific instructions on what to repair. They refused to work on some of the damaged facilities. She repaired the rest of the house and

painted it. She hired other employees herself to do the remaining job. All along she was writing down the items she bought and the expenses she incurred. At the end of the exercise she gave the list to the plaintiff who took up the matter with the defendant.

She acknowledged that the defendant paid the plumber and the carpenter whom he brought. He also paid for the painter who had been brought from Lilongwe by herself. But she maintained that there was more plumbing and carpentry work which she undertook and paid for.

The gist of Mrs Musyani's testimony is that apart from assisting here and there she did not get much help from the defendant. That the items on Exhibit P2, are what she herself paid for with money from her husband. Her final observation was that if the house was in the state she found it, the defendant could never have occupied it.

The plaintiff then called Mr. Benson Chikwatu who painted the house. He confirmed that he was hired by Mrs. Musyani to paint the house. There were several items in the house that were damaged which had to be repaired before painting. He especially noticed that the garage was in a bad state. There was an old car left there which was later pulled out to allow the garage to be cleaned before they could start painting. The materials for

painting the house were bought by Mrs. Musyani. They were at the house for two weeks.

The defendant himself did not give evidence for reasons that will be stated later in this judgment. The first witness for the defence was Mr. Joshua Aufi an employee of the defendant who was involved in the process even before occupation of the house. In court Mr Aufi said the house was not inspected before occupation although he said the house was in order. His written statement however is to the contrary. There he states at paragraph seven that the defendant took him to see the house. At the house they met a young man who introduced himself as Mr Musyani's cousin, a Mr Musyani himself who was keeping the house as the owner had since left for Lilongwe. This man opened the house for them. They got in and he showed them the rooms. They noticed that the house had been painted. The defendant eventually occupied the house.

According to this witness his master vacated the house on 4th April, 2005. On the 11th April, 2005 the plaintiff's wife came to the defendant's office. With him they left for the house. On the way it is said the plaintiff's wife told him that she had bought dulux paint and painters had already started painting the house. They had charged her K18,000.00. Mr Aufi could not confirm if the labour charge would be accepted by the defendant but a few days later he negotiated with the painters who accepted to reduce the charge to K12,000.00.

According to Mr Aufi when they went to the house with Mrs Musyani they both inspected it and some repairs had already been undertaken by the defendant. There was nothing else that required to be done. It was only that Mrs Musyani wanted to make some changes to some of the items in the house like the kitchen unit. Otherwise all was in good order.

During cross examination Mr Aufi let out a couple of revealing matters. He confirmed that the house was let out verbally and on friendly terms. At the time of occupation they (himself and the defendant) were happy with the house. They had no problems with the interior. The only problem that surfaced later was about the high water bills. He was personally involved in discussing this matter with Blantyre Water Board. On account of this problem the defendant withheld a certain amount from the rentals. Eventually however the water account for the house was credited with K110,000.00 which was used by the defendant and that the water issue was therefore resolved.

The second defence witness was Mr Aaron Chitenje. He is a carpenter. His testimony was simply that he was hired by the defendant to do some repairs at the house. He first went to the house with the defendant on the 9th April, 2005. This was before Mrs Musyani came to the house. He inspected the house together with the defendant and noted what required to be repaired. He came back to the house again on the 13th April, 2005 to do the repairs. This time Mrs Musyani was at the house.

During the inspection the areas of the house that were found wanting were:

- (a) one inside door leading to the guestroom
- (b) three other inside doors
- (c) the front entry door rim lock
- (d) missing keys to some doors
- (e) locks to four wardrobe doors.

This is the job that he did but in addition there were some other small jobs that he did as requested by Mrs Musyani. He finished what he had been requested to do and was paid by the defendant. He worked at the house for three days. During those three days there was also a plumber Mr Mpalume who had been hired by the defendant who was doing the plumbing. The plumber also completed his work on the third day. In court Mr Chitanje added that he only repaired what the defendant told him to repair.

The third and last witness for the defence was the plumber Mr Ali Mpalume. His testimony was very brief. In the company of the defendant, and Mrs Musyani the three of them inspected the house and established the following areas that required plumbing:

- (a) one kitchen tap was leaking
- (b) the corridor toilet would not flush

- (c) the main bedroom toilet would not flush and there was no flush unit lid.
- (d) The servants' quarters toilet needed washers and rubbers.

The maintenance materials were acquired by the defendant and he carried out the maintenance work in three days. Upon finishing the job he was paid by the defendant.

As mentioned earlier the defendant himself opted not to give evidence in open court. There was no reason given. Of course the court is well aware that that was well within the defendant's choice. That said however the court wishes to draw attention to the defendant's conduct as described in its ruling in this matter of the 23rd January, 2007. It is not necessary that I repeat what was observed then. Suffice to say the defendant conduct himself most unprofessionally. The defendant is himself a lawyer of long standing who is fully conversant with the conduct of cases before this court, indeed any other court in our jurisdiction. He was further represented by counsel of long standing. The court therefore expected the defendant's case to be properly and procedurally presented, at the least. To the contrary and most unfortunately I must say the defendant's case was a total mess. Right from the start the matter was characterized by several adjournments at the instance of the defendant until the court could not accommodate the applications. At the time of first real hearing there were no skeletal arguments by the defence. These

came in much later in the case. Then when the defence case started there were further problems. The exhibits were all photo copies. There was no explanation given. The court allowed the copies subject to production of the originals. Applications for supplementary documents were made extempore. Again the court allowed the applications to enable the case to proceed. All this time the defendant himself had not submitted his own written statement. It was only on the day he was to give evidence that he brought his state and alongside the statement the defendant made an oral application to bring in additional documents. The defendant's own lawyer was at a loss and could not explain the defendant's conduct.

While not stopping the defendant from testifying, the court rejected the oral application to bring in new documents at this stage of the proceedings. The court made a further order refusing to grant the defendant an adjournment. It is at this point that the defendant chose to close his case without himself giving evidence. It is to these matters that the defendant sought the Court of Appeal's intervention. The Court of Appeal saw no sense in the defendant's appeal which was dismissed in its entirety.

It is now for this court to proceed, on the evidence that has been outlined, to determine this matter on merits. Being a civil case the standard of proof to which I must be satisfied is well established. It is proof on a balance of probabilities see **Miller v Minister of Pensions** [1947] 2 ALR ER 373.

The facts that emerge from which findings can be made are few. It is not in dispute that the defendant occupied the plaintiff's house around January, 2002 by an oral agreement the discussions of which had started earlier around December 2001. At the time of occupation the defendant had inspected the house and found it to be in order. In fact the house had just been painted according to Mr Aufi.

In the course of time there were problems with the water bills which both the plaintiff as well as the defendant took up with Blantyre Water Board. The matter took a while to resolve but on the evidence from both the plaintiff and the defendant it was eventually settled. That is why the rent that the defendant withheld on account of water bills was paid to the plaintiff. Apart from the water bill problem and although the defence raised a couple of other problems such as the telephone bill and electricity bill, there was really nothing tangible established in that respect and therefore that there was no other problem with utilities.

Clearly to this court this case is all about the repairs and maintenance that needed to be carried out after the defendant vacated the house. In that regard what emerges is that a few months before the defendant vacated the house the parties talked about the matter which resulted in the written tenancy agreement Exhibit P1. Clause (e) of the Agreement states that the

house interiors should be well maintained and painted by 31st March 2005 as per tenancy agreement.

After the defendant vacated the house what is evident is that it required maintenance and painting before it could be offered for rent to other tenants. Mrs Musyani went to meet with the defendant for that purpose. The two inspected the house at some point and confirmed it required some maintenance including painting. At this stage the only real borne of contention was the extent of the repairs required. This is where the defendant has done himself a lot of disfavour. He decided not to give the court his own account of the state of the house when he was vacating.

The defence account of the state of the house after the house was vacated mainly came from Mr Aufi. Unfortunately Mr Aufi was not particularly helpful I must say. To begin with he came to meet Mrs Musyani at the house when a lot of repair work had already been done although some of the work was in progress. Secondly Mr Aufi gave the court the impression that he was being very protective of his master; quite a natural thing to do. But he over did it to the extent that he became rather unreliable. He kept on insisting that there was no inventory made when the defendant was occupying the house and that that was because Mr Musyani refused to have one made. As it turned out this was clearly a lie. All the witness meant at most is that he wished an inventory had been made because according to his

experience in such matters an inventory helps to show what requires to be replaced at the end of a tenancy agreement. Thirdly a lot of this witness's statement is about the water bill. Even in court his testimony was about the water bill. He left the court with the clear impression that that was the only real issue the defendant was taking up. Yet as discussed earlier the water problem was resolved in good time.

The other two defence witnesses, the carpenter and the plumber were brought to the house by the defendant for a specific purpose in their own testimony. They repaired what they were told to repair by the defendant after they had inspected the house with the defendant. The inspection was done before Mrs Musyani came to the house. What that meant in effect was that the defendant inspected the house alone and alone determined what was to be repaired. His visit to the house when Mrs Musyani was already in the course of repairs did not help either. This confirms what Mrs Musyani said; that the plumber and the carpenter brought by the defendant had specific instructions about what to repair and left other areas.

According to Mrs Musyani she tried to engage the defendant at every stage of the maintenance work. The defendant was not available most of the time leaving her to be attended to by Mr Aufi. Unfortunately Mr Aufi could not make any decisions. If the work was to be done she had to continue on her own and that is exactly what she did. As she undertook the maintenance and

repairs she wrote down what was bought and paid for by herself with money from her husband the plaintiff.

Mrs Musyani did not strike me to be someone who would wish to take advantage of the situation. As stated earlier she spoke for what she did and declined to comment on matters she was not conversant with and those that she was not involved in. I have no reason to doubt the amount of work she says she did when she went to carry out maintenance work at the house. What is also worth noting is that some of the areas that required maintenance are also confirmed of defence witnesses such as the kitchen units, door handles, lost keys, wardrobe doors, toilets and painting of the house.

The case for the plaintiff is also that the house could not be occupied during the months of April and May 2005 while the issue of repairs was still being looked into. In those two months the plaintiff lost K90,000.00 worth of rental. All this is included in Exhibit P2. I am satisfied in the honesty of Mrs Musyani and therefore the genuineness of what she listed in Exhibit P2 to be a true account of the work and expenses incurred by the plaintiff in bringing the house to yet a habitable state after the vacation of the defendant.

The counter claim is all about the water bill. The electricity and the telephone bills, if at all, are merely mentioned by the defence witnesses. As for the water bill, in the testimony of Mr

Aufi, the account was credited with K110,000.00 which the defendant used. It was because of that credit that the defendant paid the plaintiff the rent that he was withholding. In any case from the exhibits tendered by Mr Aufi the problem was dealt with in 2003 and early 2004. The last correspondence between Blantyre Water Board and the defendant is Exhibit D11 dated 12th February, 2004. I am in no doubt that if a substantial amount was still owing on water the parties could not have come up with paragraph (c) in Exhibit P1. It is therefore the judgment of this court dismissing the counterclaim in its entirety.

Thus far, it is the judgment of this court that the plaintiff's case has been well established. The claim succeeds in the sum of K332,487.20 which shall be payable at the reigning standard bank lending rate from the time the money was expended to the date of final settlement.

Costs of this action shall be for the plaintiff.

Pronounced in Open Court at Lilongwe this 14th day of October, 2008.


A.C.K. Nyirenda
JUDGE