

IN THE HIGH COURT OF MALAWI

CIVIL CAUSE NO. 158 OF 1978

between

MRS. J. KAIME ..... PLAINTIFF

and

J.J. FABRICA trading as CHANGU BUILDING CONTRACTORS ..... DEFENDANT

Coram: Jere J.

For the Plaintiff: Hanjahanja of counsel

For the Defendant: Chiume of counsel

Official Interpreters: Mpalika/Sonani/Kaundama/Kalimbuka

Court Reporter: Brown

JUDGMENT

By her amended statement of claim Mrs. Kaime, the plaintiff in this action, claims against J.J. Fabrica, the defendant, the sum of K5,926.00 made up as to K1,926.00 special damages (wrongly totalled in the statement as K1,922.00) and K4,000.00 refund of the contract price paid, consideration for payment in the latter sum having wholly failed. The defendant denies the allegation and counterclaims in the sum of K3,924.96 for breach of contract made up as to K307.56 cost of iron sheets bought for the plaintiff's house and K3,617.40 balance of contract price.

I bear in mind the burden of proof in civil matters. The plaintiff must prove her case on the balance of probabilities. In this particular case it is also up to the defendant to prove his counterclaim on the balance of probabilities.

I shall now proceed to examine the evidence, and I shall make my findings of fact on such evidence and the applicable law.

SUMMARY OF THE EVIDENCE

The plaintiff's evidence is that she knows the defendant as a person who carries on business as Changu Building Contractors. Some time in 1977 she agreed with him that he should go and repair



a house which was situated along Chikwawa Road in the city of Blantyre. The agreement was that the defendant should repair the inner rooms and the roof and that the house should then look like a modern house in Blantyre. The price agreed for all this work was K5,617.40 which included labour charges of K1,000.00. This amount was to be paid in three instalments, two of K2,000.00 each and the balance of K1,617.40 after the completion of the work. This agreement was reduced to writing and signed by both parties, and it was exhibited in this court as Exhibit 1.

The plaintiff further told the court that she paid the defendant the sum of K2,000.00 on 19th August 1977 and that she signed a document certifying that she had made such payment to the defendant. She signed in her maiden name, Miss Jean Kazombo. On 19th September 1977 she paid the defendant a further K2,000.00. The defendant signed for the money. The plaintiff produced Exhibit 2 to confirm the above evidence. She explained that on 19th September 1977 she paid the defendant only K2,000.00 and not K2,277.00 as shown on the document. She told the court that the amount of K277.00 was taken by her to pay the Blantyre Water Board.

It was the evidence of the plaintiff that the defendant started work on the building. After removing the roof and the poles he brought sand and bricks and started to demolish the inner rooms. He also had to repair the veranda. Then he began rebuilding the rooms he had demolished, and after that was done he brought poles to make a roof. It took about two weeks before the roof was fixed with iron sheets. The plaintiff said she went to the defendant's office and inquired whether he was going to continue with the job or not. He replied that he would continue after thirty days. He asked for another K2,000.00 so that he could purchase iron sheets, and she gave him the money, but he did not complete the work and asked for seven days' extension. Seven days elapsed but still he did not complete the work, and she told him that she would take further steps, meaning that she would take the matter to court. She then went to see her solicitors.

The plaintiff said that she asked the defendant in October 1977, when the rains had started, to stop because the work had not been completed according to the agreement. She said she again stopped him working in November because it was raining and the house had no roof. She told him she would look for another contractor to proceed with the work. The defendant then stopped work, and the plaintiff went to see her solicitors.

The plaintiff recognized a letter written by her lawyers, Exhibit 3, and she explained about the old materials left on the site. She said she had suffered damages because the defendant had removed the wiring system, and she described these damages in detail.

The plaintiff further gave evidence that she instructed Mr. Sohya to demolish the walls built by the defendant. She said she had derived no benefit at all from the defendant's work, and that she had paid Mr. Sohya K1,922.00 for the purpose of correcting the



errors made by the defendant. She concluded her evidence-in-chief by saying that the defendant did not complete the work in two months, and in November the seven days' extension had expired. She also said he did not build the house well.

In cross-examination the plaintiff said she stopped the defendant because he delayed in putting on the roof: if he had put on the roof she would not have stopped him. She contended that he did not repair the rooms properly. He had built the house but she was not satisfied. (At this point the plaintiff lost her temper.) She said she gave the defendant K2,000 after he had removed the roof. This was in September. He had told her that he was failing to put the roof on because he had no money to buy iron sheets. She paid the second K2,000 after the thirty days had expired. She said she was not following the agreement because both of them were breaching it. She gave the defendant thirty days after September and then seven days more, and then she went to the site to stop him. She said the defendant had breached the agreement because he was supposed to receive the money after putting on the roof. They started talking after two months had expired.

The plaintiff told the court that she does not know what lintels are. She said the house was old and in such a state that nobody could be expected to live in it. She said there was electrical wiring but no current.

The plaintiff said the defendant came to her house in November after he had been stopped, and she explained to him the damage he had done. She said that in November the rains damaged the house.

The plaintiff testified that the house belonged to her father, who had given it to her, and she said she was suing on his behalf and had all along been acting on his behalf. She said she was the proper person to sue because she was his daughter.

The plaintiff further said that Mr. Sohaya was paid K21,922.00. K1,922.00 was for the repair of the damages that had been caused by the defendant.

The agreement with the defendant was for two months, and it expired on 10th October; he asked for another thirty days and later on for another seven days. The plaintiff denied threatening the defendant with detention. She agreed however that she told him that he should complete building the house soon because it belonged to His Excellency's nephew. She said her intention was not to threaten the defendant but to make sure he completed the work since he had already been paid the second instalment of K2,000.00. She testified in court that she further told him that the period had expired. It was her evidence that she gave the defendant K2,000.00 in September and that the balance of the cheque, K227.00, was for the Blantyre Water Board.

In re-examination the plaintiff told the court that she grew fed up and finally asked the defendant to stop in November. She



said Mr. Sohaya started working on the building on 18th December, and that the defendant's men were also on the site at the same time. The defendant quarrelled with Mr. Sohaya, trying to stop him from working on the building. Finally the plaintiff told the court that she started bothering the defendant in the middle of October, meaning the 15th. She said Mr. Sohaya demolished the rooms which had been built by the defendant as the wall was bent.

The next witness for the plaintiff was Mr. Sohaya. He is a building contractor, trained at Kanjedza Artisan School and in West Germany. He has been in the trade for the past twenty-two years. He said that around 28th November 1977 he started fencing the property for Mrs. Kaime, and he was working on this until December 8th. After he had completed that work he was approached to give a quotation for what was to be done on the house. The plaintiff, Mrs. Kaime, accepted his quotation, and about two weeks later he started bringing materials on to the site to start the job as soon as he was authorized to go ahead. He described the house as "a small old dilapidated house having a number of walls fallen off", and he said it was to be rebuilt to a standard height and to be extended for some additional rooms, and some rooms were to be subdivided. It also needed another roof. The plaintiff wanted I.B.R., the most expensive iron sheets normally used today. Timbers for rafters, fascia boards, etc., were needed and Mr. Sohaya bought all the materials. He also removed two walls which were without foundations. He put in doors, replastered the house and removed the old electrical wiring system. He extended the veranda and changed the lintels.

Mr. Sohaya said he found the defendant on the site with ten iron sheets. The defendant asked the witness why he was there, and said he would have been allowed to complete the work if the witness had not come there. He then went away, leaving the ten iron sheets. Two days later he came to collect them. The witness said he found a few timbers on the site but no cement, no bricks, no river sand and no paint. He said the defendant had charged too much for the labour.

The witness said he had walked round the premises about 21st or 22nd November. When he visited the place his friend - meaning the defendant - was working on the premises. The witness was doing the fencing work at the time and the defendant was putting on the roof. The witness conceded that he did not know what was agreed between the plaintiff and the defendant.

It was the evidence of the witness that the house had no water and no electricity and, in short, was not fit to be called a house. He said he had rebuilt it for K21,922.000 and it was now quite different. In 1976 he had rejected a request to take on the work because he had another job to do at that time. A year later, however, when he was doing some fencing work at the plaintiff's premises, he used to see the plaintiff when she came about twice a week to inspect the progress of the building work, and immediately he had completed the fencing they started negotiating about the house. He was not sure about dates, but he said he was doing the



fencing work when the defendant was putting on the roof of the plaintiff's house.

It was further the evidence of the witness that he was not present when the plaintiff stopped the defendant from continuing with the work. He also stated that the roof was not completed; the defendant had done only half of it: the walls too were not completed.

In answer to the court's question, the witness said that he finished work on the house about August 1978. There had been some delay because of difficulty in obtaining cement and ceiling boards. Under the contract he had been given three months within which to complete, and later on another month when he explained about the difficulties.

The foregoing is the evidence for the plaintiff. I now turn to the evidence of the defendant.

The first witness was the defendant himself, Juwawo Joe Fabrica, of P.O. Box 5235, Limbe. He said he was a building contractor doing business under the name of Changu Building Contractors. He identified the plaintiff in court and said that he had built a house for her. It was his evidence that prior to the construction of the house the parties had entered into an agreement and such agreement was reduced to writing; he identified it as Exhibit 1. It was signed by himself, the plaintiff and Mr. Rajabu. He described the work that was to be done under the agreement. He further told the court that there was another document showing what materials were to be used on the building. He called this document a quotation (Exhibit 4), and the amount quoted for the work was K5,617.40. This was accepted by the plaintiff. The defendant was to provide the materials listed. He described how he was to be paid, and said that the agreement was subject to the availability of cement and other materials.

The defendant told the court that he was paid the first instalment, namely, K2,000.00, but that he did not receive the second instalment of K2,000.00. He said that the plaintiff called him to the bank to cash a cheque which was in his name. She told him that the cheque was in the sum of K2,277.00 and that he would receive K2,000.00; the balance was to pay water bills. However, when he had signed the cheque on the back and it was cashed the plaintiff told him he must come after three days to get his money at her house. He did not go direct to her house as she had instructed, but went first to the site to see the progress of the building and to deliver some iron sheets, thinking that from there he would go to see her, but on the site he found Mr. Sohaya with the plaintiff. His foreman Rajabu explained to him that they had been stopped by the plaintiff from working on the building. The defendant asked the plaintiff about this, and she told him to stop work on the building and threatened him with detention if he did not, claiming that she was a niece of the President. However, the defendant wanted to continue working on the house, so he got a ladder and began climbing it so as to put some iron sheets on the



roof, but the plaintiff started pushing the ladder and he had to jump off. He then told her that he had done nothing wrong and that the agreement between them did not concern the name she had mentioned, i.e., the President, but she repeated that if he continued working on the building he would go to prison as she had already told him. He said he then left the site with all his workers, leaving behind the iron sheets and all the materials he had bought for use on the building.

Questioned about the iron sheets, he said he had bought them from Steel Supplies for K307.56. He then described what work he had done on the building. He said he had put thirty-four iron sheets on the roof and twenty-seven remained to be fixed, and that had he not been stopped he would have completed the roof that same day.

The defendant said he had used the correct materials, as he always did. At first the house had resembled a barn, but after he had worked on it it looked like a planned house. Inside it now had a big sitting-room, two large bedrooms, a kitchen, a bathroom and two rooms for toilets with a passage leading to them. He said that when the plaintiff used to come to see the work while it was in progress she did not complain.

The defendant said that he had received only K2,000.00, not K4,000.00. He explained how he had signed the cheque. He explained how his counterclaim was made up. K307.56 was the cost of the iron sheets and K3,617.40 was the balance of the contract price, making K3,924.96 in all. He said if he had not been stopped by the plaintiff he would have completed the building without difficulty. He told the court what his qualifications were, namely, a Grade I Certificate obtained from Mozambique, also Grades III, II and I obtained from Malawi, and a Diploma in Building Construction from the Republic of South Africa.

Finally in examination-in-chief he said that the plaintiff did not give him any notice to stop building, nor did she explain to him the reasons why he was being stopped.

The defendant was cross-examined at length about Exhibit DX.1, which was a statement from Steel Supplies (Malawi) Limited addressed to Changu Building Contractors, and he explained how he obtained it. He said he had a feeling that he bought iron sheets for the house he built for the plaintiff but that most of the invoices and receipts were lost when his documents were confiscated.

The defendant alleged that Mr. Sohaya and the plaintiff had conspired against him.

He agreed that he had not bought ceiling boards, but he said that the roof was made. He also agreed that there was no electricity. That stage had not been reached.

He also said that the plaintiff must pay him because he had not wanted to leave the work. He said they had agreed that completion of the house depended upon the availability of materials.



The defendant again explained how the plaintiff had cheated him, and went on to say that he was insulted. He said he had forgotten to say this in examination-in-chief. He said he did not sue her because she was going to sue him. He had not demanded the money even after he had received a letter from Sacranie, Gow & Company.

The defendant denied that he had perjured himself in court. He said he had reported the matter to the police and he was advised to take no action since the matter was in the hands of the court.

He further said that after the extension of thirty days he did not finish the house because there was no timber. He said he had asked for an extension in August and complained about timber. He said he intended to finish the work but he was stopped in September.

In re-examination the defendant said that making holes around the walls was not bad workmanship. He was afraid of the rains coming, and he said that sometimes there are showers in July. He denied that two walls were without foundation. He told the court that he did not damage the electrical wiring. There were no wires in the house. He denied that the plaintiff kept pestering him after the agreed period to complete the house.

Douglas Rajabu gave evidence for the defendant. He said he was working for Changu Building Contractors as a building foreman in 1977. In August of that year he was working at premises belonging to the plaintiff. He said the house was long and high, like a barn. He told the court that they demolished some of the rooms and some of the outside walls which were rotten. They then dug a foundation and started rebuilding the house. After completing building the whole house they put on the gables, and then the carpenters came and put new capitals on the roof, completing the whole house. There were some iron sheets there, and they started roofing the house, until only one side remained to be done - a small part. The carpenters then started putting on brandering for the ceiling and four rooms were done. The defendant went to collect more iron sheets for the roof, and while he was away the plaintiff and Mr. Sohaya came and told them to stop working. When the defendant returned with the iron sheets he found his employees just sitting there. He asked what had happened that they were not working, and the witness answered that the plaintiff had told them not to continue working on the building. Before the defendant could say anything the plaintiff repeated "Do not continue working on this building because if you continue you will go to jail. You don't know that this house is for the brother of the President." The witness said the defendant did not listen to that but began to climb a ladder to get on top of the house and continue with the roofing. However, the plaintiff tried to stop him climbing the ladder, again telling him not to continue, and finally the defendant came off the ladder and asked all his workers to get in the car, and they drove away leaving all the materials. The witness said he did not know why they were stopped from building the house. There had been no complaints from anybody while they were building.



In cross-examination the witness stated that he comes from Thyolo but not from the same village as the defendant. He said he now works for another company. He testified that he was called by the defendant to give evidence, but said that they did not discuss the evidence he was to give in court. He denied signing Exhibit 1, saying he does not know how to read.

The witness reiterated what he had told the court in examination-in-chief about the condition of the house and the work they did on it. He said the plaintiff came when they were constructing beam-filling and stopped them from working. On the matter of the plaintiff's threat to the defendant, when asked why he did not advise him to report it to the Party or the police he said he was an employee and could not advise the defendant what he should do. He said it was in August 1977 when this incident took place and they were stopped.

The foregoing is a summary of the evidence for both parties. I shall now proceed to the second stage.

#### FINDINGS OF FACT AND APPLICABLE LAW

There is no dispute that the plaintiff and the defendant entered into a contract for the repair and rehabilitation of a house. It is clear from the evidence, and I so find, that this was a dilapidated house. The preliminary question is as to the ownership of the house. It has been suggested that the plaintiff is not the owner of the house and hence is not entitled to sue. There is evidence from the plaintiff that the house was bought for her by her father. There is further uncontradicted evidence that the contract was solely between the plaintiff and the defendant. She was in possession of the house. None of this is denied by the defendant. For the above reasons I find that the plaintiff is entitled to sue for the alleged breach of contract.

It is not disputed that the parties reduced their contract to writing: see Exhibit 1. This document stipulates the mode of payment. The defendant was to be paid in stages. The legal position created by this document is that the contract is entire and not divisible notwithstanding the mode of payment: see Cheshire and Fifoot, Law of Contract, Ninth Edition, page 525.

This contract had one important provision, which was that the work had to be completed in two months' time. The parties had therefore made time of the essence of the contract.

The evidence is that the defendant received the first payment provided for in the contract on 19th August 1977, when he was paid K2,000.00. This again is not in dispute. The defendant started work on the house and, according to the plaintiff, some time in September, before the 19th, he approached her for more money to buy iron sheets and other building materials. This is admitted by the defendant. The plaintiff testified that she received a cheque in the sum of K2,227.00 from her father in the name of the defendant. Out of this amount K227.00 was to be paid to Blantyre Water Board



for water at the house. The balance was for the defendant. She called the defendant and they went together to the bank, where the cheque was cashed. She gave the defendant K2,000.00 as he had requested, and he signed for the money. She kept the balance.

The defendant disputed the fact that he had received this amount. His version of the story is that after the cheque had been cashed and they had left the bank, he already having signed for the money, the plaintiff refused to give him the money. She insulted him, and then she said he must come to her place after three days.

I have to decide which story on the balance of probabilities is correct. The story that the defendant did not receive the money only came out in the defence case.

Mr. Chiume cross-examined the plaintiff at length but did not put to her that the defendant had been tricked into signing Exhibit 2. Perhaps it would be useful to look at the cross-examination.

"Q. Now when you informed him of the fact that the owner of this house is the nephew of H.E. the Life President, what did you expect him to get out of? What did you want him to get out of?

A. When I said those words my intention was not to threaten him because he had received the sum of K2,000.00 which I paid the second time and he didn't use that money for the work and time had elapsed and two months after ..."

Again:-

"Q. Yes, this cheque, the second cheque which you paid Mr. Fabrica on the 19th of September, Mr. Fabrica never asked you about it?

A. Mr. Fabrica came to my house and asked for K2,000.00.

Q. But you gave it to Mr. Fabrica because the whole cheque of K2,227.00 was in the name of Mr. Fabrica and at the time you wanted your K227.00 to be given to you by him so you paid him on your own to get your money back so that you could pay Blantyre Water Board?

A. No. When I gave him the cheque for K2,227.00 the defendant had come to my house and I was in the hostel because there was no water tap. That is why I wanted K227.00 for water."

At no stage does counsel put to her that the defendant did not receive the money - that in fact he was tricked into signing Exhibit 2.



From the above evidence it is clear that it is assumed by counsel and emphasized by the plaintiff that the defendant did receive K2,000.00. The purpose of the cross-examination seems to me to have been to establish that the defendant did not request the second payment.

It is also clear from the pleadings that the defence did not deny receiving the second payment. I am mindful of the fact that Mr. Chieme says that there were several amendments to the statement of claim and in his view the original defence covered all the amendments. I think he is mistaken. This was a serious allegation which counsel ought to have dealt with specifically. In my view the fact that this matter was never raised in cross-examination shows clearly that it was an afterthought.

I have observed the demeanour of the plaintiff and of the defendant. The plaintiff impressed me most favourably on this aspect of the evidence. She was firm, she did not hesitate. On the other hand, the defendant appeared timid and unsure of himself. When asked what action he took after the plaintiff had failed to give him the money he said he did not do anything. The reasons he gave for simply keeping quiet were unconvincing. The plaintiff's story is backed up by the acknowledgment made by the defendant on Exhibit 2. He did not raise any issue about this until the last moment when giving evidence-in-chief. All this clearly shows that the plaintiff's story is the correct one. I prefer it to that of the defendant. I find as a fact that the defendant received K2,000.00 in September, being the second instalment. It is immaterial that the stage for the second payment according to Exhibit 1 had not then been reached.

I now come to the most crucial point, i.e., the alleged breach of contract. The plaintiff appears to be saying that the defendant is the offender in that he failed to complete repairing the house within the stipulated period. The defendant, on the other hand, alleges that he was stopped from completing the house for no good cause, and that he was always willing to complete his part of the bargain. He contends therefore that the plaintiff is in breach. The defendant's argument covers the counterclaim.

There is no doubt that the defendant commenced working on the building as agreed. There is evidence that the plaintiff used to go to the site once or twice a week. (This is the evidence of Mr. Sohya.) It is the defendant's evidence that in August he went to the plaintiff and told her that there might be delays in completing the house because of timber shortages. She allowed him to continue working. She gave him an extension of thirty days, and later on a further seven days, according to the defendant. It appears to me that this was in August. The reason is this: he says the plaintiff had received a cheque in the sum of K2,227.00 in August. Both of them went to the bank, the cheque was cashed and they went outside the bank where she refused to hand over the money to him and told him to go to the house after three days. He returned to the building site, where he found her and Mr. Sohya. She was hostile, and his men had stopped work. He was informed by



his foreman that the men had been told to stop work. The plaintiff confirmed this and threatened him with detention, and she attempted to remove him physically from the ladder as he was about to go on to the roof. Finally he departed with his workers, leaving the materials behind. He has never returned to the site to collect them.

The evidence of Rajabu clearly does not support the defendant in so far as time is concerned. He talks about the arrival of the plaintiff and Mr. Sohaya on the building site. He then describes what took place and their eventual departure from the site. His recollection about the exact time when they were dismissed from the site is not consistent.

The defendant's evidence is not supported by his own document Exhibit DX1, which is dated 31st December 1977. I shall have more to say about this document later in my judgment. Surely, if he bought iron sheets in December and collected them then, he could not have put the same sheets on the plaintiff's house in August or September of that year.

What is certain, however, is that the defendant was asked to stop building the house, and Mr. Sohaya was present when the defendant was eventually sent away from the site.

In examination-in-chief the plaintiff told the court that she ordered the defendant to stop building the house in October. She had earlier stated that in September she had asked the defendant whether he was going to continue with the house or not. He complained that he had no money, and she gave him K2,000.00. Nothing was done, so she went again and asked him about it and he said he would complete the work within seven days. He did not do so. She then told him that she would take the matter to court. She said she told him to stop because he had not finished the work according to the agreement that he would complete the job in two months. She said she came again in November about the same matter and asked him to stop work on the house because it was raining and the house had no roof. The defendant had made holes round the walls so that the rainwater would not remain inside but would escape through to the outside. The plaintiff asked him to stop work on the house and said that she would look for another contractor to proceed with the job.

The plaintiff said she was at the site when the defendant's men met Mr. Sohaya's men and were quarrelling. The plaintiff told the defendant's workers to leave the place, so they departed. The matter was handed over to the plaintiff's solicitors, who wrote a letter in December to the defendant.

In cross-examination, after initially stating that she had started chasing him in August, the plaintiff said she finally asked him to leave on September 26th. However, later on in cross-examination she told the court that "After two months according to the contract I went to the defendant to ask about the house". Again in answer to Mr. Chiume's question she said she was asking the defendant, not his employees.



The cross-examination then continues:-

"Q. Now earlier on you were asked what you meant when you said that 'I will take the matter further' or 'I will take further steps', and you said you meant you were going to take the matter to court.

A. The agreement was for two months and it expired on 10th of October and he gave me another thirty days and later on another seven days. I said I would take the matter further because thirty days had elapsed and also seven days had elapsed after the two months agreed."

The plaintiff told the court that she did not write a letter to the defendant asking him to stop work but told him personally at his office. She said that Mr. Sohaya started working on the property in December 1977.

The court has to make a choice between the two stories. Did the plaintiff dismiss the defendant from the building site in September 1977 or in November/December 1977? For the September date there is the evidence of the defendant himself. Rajabu says it was in August. September is therefore not supported by any other evidence. In fact there is some outside evidence in the plaintiff's case which seems to point to the fact that it could not have been September when the defendant was dismissed from the premises, i.e. the evidence that he bought iron sheets for the house in December 1977.

Initially the plaintiff said she stopped the defendant in September 1977, but she quickly changed this and said she stopped him after the time limit had expired and the extension of thirty-seven days had also expired, so she dismissed him around the second week of November.

There is some evidence to support the plaintiff, namely, that of Mr. Sohaya. Mr. Chiume says that Mr. Sohaya's evidence should not be accepted as he was an interested party. I agree that to a certain extent he was an interested party, but this does not mean that his entire evidence is valueless. However, in examining his evidence I shall bear this in mind. He said he started fencing the house around 28th November and he was doing the fencing until December. In cross-examination it was put to him that he began work on the building in September and that in fact this was what the plaintiff said. After accepting that the plaintiff must be right, he then said he did not take an interest in it at that time.

I think that this kind of cross-examination is misleading. Mr. Sohaya said that September was too early. I think he did not realize the importance of dates in this matter. He was not interested. Having observed his demeanour and his general lack of interest, I am of the view that he was telling the truth when he said he started work at the premises, i.e. fencing them, on 28th



November or in early December. This evidence therefore supports the plaintiff's case that she discharged the defendant after having given him thirty-seven days' extension.

There is the evidence that the defendant eventually left after a scene at the site. His men were quarrelling with Sohaya's men and the plaintiff told him to leave after threatening him with dire consequences if he failed to vacate the site. Mr. Sohaya seems to say that there was no such quarrel and that he was not there when the plaintiff told the defendant to stop work. I think he is not speaking the truth, and that he is afraid of coming out in the open. He only says that the defendant said that if he, Sohaya, had not come on the scene he would have been given more time to complete the house. It is not clear whether these were two separate episodes when the plaintiff asked the defendant to leave the site and when the workers quarrelled. I think it was one incident, and must have taken place in November 1977, not September.

There is also the evidence of the defence witness Douglas Rajabu. Towards the end of cross-examination he stated that they started work in August and were stopped in November/December. He had earlier on described what had happened between the plaintiff and the defendant. From this evidence it becomes abundantly clear that time was initially made of the essence of the contract. The defendant had experienced some difficulties. He had been given extra time which according to the plaintiff was thirty-seven days from the stipulated time, that is, 10th October. Thirty-seven days elapsed and some time towards the third week of November the plaintiff stopped the defendant. I do not believe Mr. Chiume's contention that the defendant was stopped in September or October, so in these circumstances, although the plaintiff had waived the initial deadline, she had waived it on condition that he would complete within the thirty-seven days agreed between them. By that extension she had again made time of the essence of the contract. In these circumstances the defendant was in breach because he failed to complete within the agreed time.

A lot of heavy weather has been made about the manner in which the plaintiff stopped the defendant from carrying on work at the premises. It has been forcefully put to the court that he was threatened with detention and that the plaintiff had warned him that the owner of the house was a relative of the President. He was questioned at length as to whether he had reported to the police, and he said vaguely that he had reported to a Special Branch officer. He further said he could not report to M.C.P. branch officials because he thought he would not get redress from them.

I do not see the relevance of this evidence. It was the plaintiff's intention to get rid of the defendant, and since he persisted in remaining on the premises she threatened him. I do not think that this was a good thing to do, but it does not alter the facts in the case. She threatened him when he had overstayed at the site. In these circumstances I have only referred to this



matter because a lot has been said about it, but from a purely legal point of view I do not really place much weight on it. It was not the best thing to do morally.

In the circumstances, therefore, the plaintiff was entitled to treat the defendant as being in breach of the contract. The claim accordingly succeeds. I shall, however, examine the amount claimed to see whether this amount is supported by the evidence.

Before I come to the counterclaim it is necessary to deal with the damages as claimed by the plaintiff. I shall quote in extenso paragraphs 4, 5 and 6 of the statement of claim.

- "4. THE DEFENDANT removed the whole roofing and in the process of so doing damaged the electrical wire system, doors, windows, burglar bar windows, 7 lintels, the veranda floor cause, old sheets, and parts of the walls of the house.
5. BY REASON of the matters aforesaid the plaintiff has had to employ another builder to remedy the said defects and to complete the said work and she has been put to trouble inconvenience and expense and she has thereby suffered loss and damage.

PARTICULARS FOR SPECIAL DAMAGES

a)	Electrical wire system	K 914.00
b)	Doors	279.00
c)	Windows	316.00
d)	Burglar bar windows	226.00
e)	7 lintels	119.00
f)	Veranda floor cause	60.00
g)	Old sheets	12.00
		<u>K1926.00</u>

6. ACCORDINGLY the plaintiff claims against the defendant the sum of K1926.00 and a refund of the K4,000 paid for the contract price, the consideration for the payment of the said sum which wholly failed, the defendant has had and received the said sum to the use of the plaintiff. THE PLAINTIFF therefore claims K5,926.00."

I have in mind paragraph 5 of the statement of claim as quoted above. I find it difficult to understand why this claim has been made. To start with -

(g) /



(g) Old sheets

We have had evidence here that the sheets were stolen but for some reason the matter was not reported to the police. I see no reason why a claim should be made as special damages for the loss of these old sheets.

(f) Veranda floor cause

What this means I do not know. However, when the initial repairs were to be effected by the defendant it must have been in the contemplation of both parties that demolition work would have to be carried out, so the fact that the veranda floor was broken constitutes no special damage to the plaintiff.

(e) 7 lintels

The plaintiff did not know what lintels were. However it is clear that these lintels were taken out so that proper ones could be built in their place. I do not see that this gives any cause for complaint.

(d) Burglar bar windows

It is not clear where these burglar bar windows have gone, but I would be reluctant to saddle the defendant with liability for these.

(c) Windows

The same remarks apply.

(b) Doors

The same remarks apply.

(a) Electrical wire system

On the evidence before me I do not think the plaintiff proved that the electrical wiring system was damaged by the defendant.

The claim for special damages in the sum of K1,926.00 therefore fails.

I now come to the refund of the K4,000.00 paid for the contract price. It is alleged that consideration for the payment of the said sum has wholly failed. The law is clear and simple in an entire contract such as the present one. "Where interim payments have been made under an entire contract, but the contractor has failed to complete the works, the employer, because the consideration has failed, is entitled to recover the payments already made." Halsbury's Laws of England, Fourth Edition, Volume 4, paragraph 1148. In the instant case it is agreed by both the plaintiff and the defendant that this was an entire contract. The defendant breached the contract, therefore allowing the plaintiff



to treat the contract as at an end. . In these circumstances, therefore, the question arises as to whether the plaintiff is entitled to recover the K4,000.00 that has been paid.

There are cases which suggest that in certain circumstances a party who is in breach of a contract can nevertheless recover by a fresh cause of action for the recovery of the moneys on the basis of quantum meruit. Such may be the case where the facts indicate that a different contract was entered into after the collapse of the initial one. It appears to me that this is not the position here.


The other principle upon which it has been stated that a party in breach may recover is to be found in the case of H. Dakin & Company Limited v. Lee (1916) 1 K.B. 566. This principle was applied in Hoenig v. Isaacs (1952) 2 All E.R. 176. In both these cases substantial work was done and only minor items remained unfinished. The facts were therefore vastly different from those in the present case. In these circumstances, in my view the principles as contained in Halsbury's Laws of England are applicable. The instalments that had been paid are to be recovered from the defendant. I therefore award the sum of K4,000.00 to the plaintiff.

I have considered whether the plaintiff has suffered damages as a result of the breach of contract by the defendant. This was not argued, and in any event the plaintiff quickly instructed another contractor to fill the gap left by the defendant. For this reason the damages suffered are nominal.

I now turn to the counterclaim. This depended entirely on the success of the defence. The defendant contended that he was unlawfully discharged from doing his work and that he has always been ready and willing to complete the work. I have found that he was in breach of the contract, and therefore his claim cannot succeed.

I have also considered his claim for K307.56 for iron sheets. He completely failed to establish this in court. I therefore dismiss the counterclaim.

Pronounced in open court this 21st day of October, 1981, at Blantyre.

  
N.S. JERE  
JUDGE

COSTS /



COSTS

I award costs for the plaintiff for both the claim and the counterclaim.

Made in chambers this 22nd day of October, 1981, at Blantyre.

  
N.S. JERE  
JUDGE