

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.734 OF 1987



BETWEEN:

PETER LUSEWA PLAINTIFF

AND

THE MUSLIM ASSOCIATION OF MALAWI DEFENDANT

CORAM: MKANDAWIRE, J.
Chatsika of Counsel for the Plaintiff
Jussab of Counsel for the Defendant
Manondo (Mrs), Official Interpreter
Phiri/Longwe, Court Reporters

JUDGMENT

It is not in dispute that there was a building contract between the parties. This was to take place at the Blantyre Islamic Centre at Chadzunda near Mpemba on the Blantyre/Chikwawa Road. It was agreed that the plaintiff should build two blocks of buildings. One block consisted of 4 units, while the other block consisted of 5 units. Each unit would comprise:

- 1 dining room
- 1 sitting room
- 2 bedrooms

To each unit was to be joined a sub-unit consisting of:

- 1 kitchen
- 1 bathroom
- 1 toilet

A unit was therefore a complete house on its own and the plaintiff was to build 9 such units/houses in 2 blocks. It was part of the agreement that the defendant would provide all the building materials, while the plaintiff would provide labour. Providing labour involved employing bricklayers, painters, carpenters, watchmen, labourers, women to draw water as there was no piped water and, indeed, the entire workforce. All this is not in dispute. What is in dispute, however, is the price attached to this contract. Most surprisingly, it was not reduced into writing.

Apart from this main contract, there were supplementary contracts, so to say. Each supplementary contract, however, was a contract on its own. I shall come to these supplementary contracts later in this judgment.

It was the plaintiff's evidence that the total cost of building the two blocks containing 9 units was K18,000.00 at K2,000.00 per unit. He said he carried out the negotiations with Sheik Saad Al-Talib who is no longer in the country. He told the Court that he had suggested that the contract be put in writing, but the defendant never drew up any contract, so the matter was left in abeyance. When he started the job he had some capital of his own and he was paying salaries out of this. But before completion, he run out of money and so he had been advanced a sum of K6,200.00 to enable him pay his workers. The agreement was that he would be paid at the end of the contract. Having been advanced K6,200.00, the balance was K11,800.00. The contract was over in June, 1985, but when he had demanded payment he was told there was no money as the defendant was waiting for money from donors. This went on until he decided to institute these proceedings. It was his evidence that at the end of the contract he had problems with his workers and so they took away all his implements. This was because he could not pay them as the defendant had not paid him.

The only real witness for the defendant was Mr. Farrad Hassan who was the Administrative Officer and later Executive Secretary of the defendant. There was a second witness, but his evidence did not amount to anything. Mr. Hassan's evidence was that as Executive Secretary he knew details of the contract between the parties and the terms of this contract were negotiated in his presence. It was Mr. Hassan's responsibility to draw up contracts and to see to it that they were signed. Perhaps I should mention that Mr. Hassan is a lawyer by profession. He left the defendant's employ in 1989 and he is now an advocate with the Department of Legal Aid. Mr. Hassan failed to come up with any reasonable explanation as to why this particular contract was not reduced in writing. At one point in his evidence he suggested that it was the plaintiff who was refusing to sign, but he did not insist for he realised that such an assertion would not make any sense at all.

The evidence of Mr. Hassan was that the contract price for the 2 blocks comprising 9 units was K6,400.00, that this was paid in full as was agreed. It was his evidence that this was to be paid in four stages - at slab level, window level, roofing level and completion, less 10% retention fee. It was conceded that the retention fee has not been paid todate. Towards the end of the contract the plaintiff requested that he should fix doors and do some other carpentry work. This was granted him as an extra contract and at an agreed cost of K1,000.00. A document headed "Settlement" was drawn up. It

was in fact Mr. Hassan who drew up this document and according to him it embraced the entire contract and not just carpentry work. It is the defence case that this document signed on 5th June, 1985, marked the end of the contract. I shall come back to this document at some convenient time in this judgment.

As I have mentioned above, apart from the main contract, that is the two blocks consisting of 9 units, there were also extra jobs and each was a contract on its own. These were particularised as follows:

- (i) To construct floors between the house and kitchen made of 3" hard core using broken bricks and stone. A figure of K2,025.00 was agreed for each block of 4 units and 5 respectively and the total cost of the 2 blocks was K4,050.00.
- (ii) Construction of 2 septic tanks with soakaways and manholes at a cost of K1,200.00 each = K2,400.00.
- (iii) Carry out ant-protection work covering the entire floors of the 2 blocks at a cost of K500.00 per block = K1,000.00.

The plaintiff's claim is in the total of K19,250.00, plus interest. It was the plaintiff's evidence that he did all these extra jobs as was agreed, but at the end of the day he was not paid both on the main contract and on the extra jobs. Mr. Chikhadzula, PW.2, a quantity surveyor by profession, testified that from the information he got from the plaintiff and from his own physical viewing of the total construction work done by the plaintiff at the Islamic Centre, he estimated that labour alone would cost K25,000.00.

It is now time to evaluate the evidence. As both learned Counsel had correctly observed, this case is mostly factual. It is a question of who to believe as between the plaintiff and the defendant. This case is not based on a quantum meruit and to this effect, Mr. Chatsika submitted that the purpose of calling Mr. Chikhadzula was merely to show whose evidence is likely to be true. Speaking for myself, I find little difficulty in thinking that it is the plaintiff's evidence which has the probability of truth. I am presently dealing with the main contract. I had the occasion to see both Mr. Lusewa and Mr. Hassan and I formed the impression that Mr. Lusewa's evidence has the ring of truth. Mr. Hassan had immense difficulty in explaining some of the things. For example, he was clearly in trouble when pressed as to why no written contract was drawn and signed. I now set out in full the settlement which Mr. Hassan claims covered the entire contract:



DATE 5th June 1985

SETTLEMENT

That the Association and Mr. Lusewa have agreed to settle their contract as follows:

1. Upon finishing all carpentry jobs the Association shall pay Mr. Lusewa K1,000.00 only.
2. Mr. Lusewa shall not at all have any claim against the Association on the matters regarding the houses he was working on.
3. Mr. Lusewa's labourers shall be the concern of him as a labour contractor.
4. That the Association shall have no further claim against Mr. Lusewa.
5. This marks the end of the contract in respect of the construction of the houses."

Mr. Lusewa's explanation is that this document only relates to the carpentry job for which he was duly paid. I think that it is Mr. Lusewa's explanation that makes sense. This document was prepared by Mr. Hassan and it was signed by him and Mr. Lusewa. One wonders why Mr. Hassan found it fit to prepare this settlement document for the carpentry job. If this document covered the whole work, including the main contract, then one would have expected the full contract price to be spelt out in the document and that Mr. Lusewa was fully paid. The document does not even give details of the jobs the plaintiff did, it only refers to carpentry work and as I said earlier, each additional contract was a separate and complete contract on its own. That is why I am inclined to agree with the plaintiff that the document only relates to carpentry work. In his submission Mr. Jussab suggested that paragraph 5 can only mean that the document covered the entire work performed by the plaintiff. I think it unfortunate for Mr. Jussab to try to capitalise on paragraph 5. I am aware that parties are free in contract, but I think it is inconceivable to suggest that the plaintiff agreed to build all the 9 units/houses for only K6,400.00. This is highly improbable. As for the settlement document put in by Mr. Hassan, all I can say is that I find it woolly, ambiguous and crafty. It certainly does not stand for all the work the plaintiff did. In the result, I find that the plaintiff was to build the 2 blocks comprising 9 units at K2,000.00 a unit, making a total of K18,000.00. Since he was advanced the sum of K6,200.00, I enter judgment in the sum of K11,800.00.



I now turn to the extra jobs or contracts. The defendant's case was full of contradictions. In his evidence Mr. Hassan said the only extra job given to the plaintiff was carpentry work. In cross-examination he conceded that he saw the plaintiff construct concrete floors, septic tanks and manholes, but he did not know how these were negotiated. He did not even know whether these were paid for. Mr. Hassan was not sure but he thought these had been negotiated for by his boss. Mr. Jussab submitted that septic tanks and manholes could not be a separate contract as these are usually built together with the house. This was contradicting their own defence, because at paragraph 3 of its defence, the defendant concedes that there was a supplementary agreement to construct concrete floors between each house and kitchen and 2 septic tanks and manholes. It is stated in the defence that the agreed price was K1,000.00. I think that the defendant is in total confusion. The K1,000.00 was for the carpentry job and not for floors and septic tanks. The plaintiff's evidence is solid in this respect. I therefore find that there were indeed extra or supplementary agreements to construct concrete floors and septic tanks and manholes for K4,050.00 and K2,400.00 respectively and that upon completion the plaintiff was not paid. I do not think it fatal that in his evidence Mr. Lusewa mentioned a wall between units, although this was not pleaded. The main substance of the extra jobs was pleaded and this was conceded in the defence. I therefore enter judgment in these amounts.

I now turn to the third extra or supplementary agreement to carry out ant-protection work covering the entire floor of the 2 blocks at K1,000.00. Mr. Hassan said the plaintiff did not do this as this was already done at slab level. The plaintiff's evidence was that ant-proofing was not done at slab level and so he was asked to do it later at an extra cost. I do not think that Mr. Hassan's memory served him right. He gave me the impression that he was telling the Court what usually happens in construction work and not what actually happened in this particular case. When pressed in cross-examination he said fumigation was done by a different company by the name of Hawk Industrial and Agricultural Trading Limited. I think he was confusing matters. I think that it is the plaintiff's story which carries the probability of truth. I therefore enter judgment for K1,000.00.


In the final analysis I enter judgment for the plaintiff in the sum of K19,250.00.

The plaintiff has prayed for interest. Mr. Jussab said that this was ill-founded as it is not shown from what date interest is to be awarded. I do not think Mr. Jussab was serious. It was clearly pleaded and borne out by the evidence that the contract was completed in June, 1985 and that is when the moneys became payable. Interest will therefore run from that time. I therefore award the plaintiff interest at the

normal bank rate obtaining in June, 1985. If the parties cannot agree as to what interest is payable then the plaintiff is at liberty to apply to Court for assessment.

The defendant is condemned in costs.

MADE in Chambers this 18th day of February, 1991, at Blantyre.


M. B. Mwandawire
JUDGE