

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 2 OF 1988



BETWEEN: S. B. MWAMBUCHA PLAINTIFF

- AND -

RANGERS CAR HIRE AND CAR SALES DEFENDANT

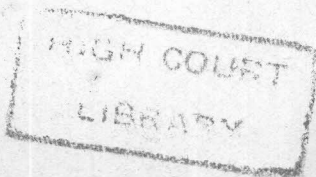
CORAM : **MAKUTA, CHIEF JUSTICE**
Nakanga, for the Appellant
Mandala, for the Respondent
Gausi (Mrs), Court Reporter
Kholowa, Court Clerk

J U D G M E N T

This is an appeal from the judgment of the Resident Magistrate sitting at Limbe. The judgment was delivered on 12th June, 1986. The grounds of appeal are:-

1. That the learned Magistrate ought to have given judgment for the defendant on the counterclaim as there was a prima facie case and evidence to support it.
2. The learned Magistrate erred in law in ordering the defendant to institute fresh proceedings.

Briefly the facts are that the Respondent claimed the sum of K973.50 being the amount due from the Appellant to the Respondent for goods sold and delivered by the Respondent to the Appellant at his request. It would appear that the case was set down on several occasions and on each occasion the Respondent did not appear and it was adjourned. On the day it was heard the Respondent again did not appear. The Appellant, however, proceeded to give his defence. It was his testimony that he bought a second hand Nissan Pick Up from the Respondent at



K2000.00. He paid by instalment and was able to produce receipts, exhibit D2. He collected the vehicle on 4th January, 1983, but the Respondent did not give him the COF, certificate of fitness, book because it was missing. He was advised to go back and check later. When the road licence was due for renewal he was advised to bring the COF. He then went back to the Respondent for the COF book. The Respondent advised the Appellant to leave the vehicle for service before it went for COF. He went back after a fortnight and was informed that the engine had been taken out and was sent to Gatto for servicing. After another fortnight he was told to go back after another fortnight. When he went back on the fourth occasion he was asked whether he could accept a new engine but he had to pay for it. The engine was fitted on the vehicle. It is not clear though whether it is a new or an old engine. According to the Appellant he paid the labour charges by instalment until he finished. Subsequently he started receiving letters that he must pay K937.50 for the engine and he refused. He then wrote them offering to return the vehicle. He was called for some discussion and it was agreed at the discussion that the vehicle should be sold for K2500.00. After selling the vehicle the Respondent were to deduct the sum of K973.50 and return the balance to the Appellant. It would appear the vehicle is still with the Respondent.

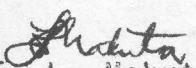
The Appellant's testimony was not disputed. In his defence he denied owing any money to the Respondent. He counterclaimed the sum of K2000.00. The counterclaim was not disputed in Court. At the end of the hearing the learned Resident Magistrate proceeded to dismiss the Respondent's claim and the Appellant's counterclaim.

Order 19 r 3(3) of the Subordinate Courts Rules (Cap 3:02) provides that if the plaintiff does not appear, the claim may be dismissed and the court may hear and determine any counterclaim. I am of the view that the Respondent having absented themselves and the Appellant having adduced evidence on the counterclaim, judgment should have been given in his favour. I accordingly order that the learned Magistrate's dismissal of the counterclaim be set aside and judgment in favour of Appellant on the counterclaim be entered.

I now turn to the second ground of appeal. The learned Resident Magistrate at the end of the day advised the Appellant to institute fresh proceedings against the Respondent. It is difficult to appreciate how fresh proceedings could be started when both the action and the counterclaim are dismissed. Once an action or a counterclaim has been dismissed fresh proceedings may be met by the defence of res judicata.

In view of my finding in favour of the counterclaim above, the advice to institute fresh proceedings is of no consequence and may be viewed as rhetoric.

PRONOUNCED in open Court on 11th day of September, 1991.


F. L. Makuta
CHIEF JUSTICE