

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.653 OF 1991



BETWEEN:

A.S. FREITAS PLAINTIFF

AND

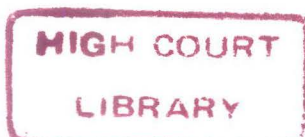
A. ROCHA DEFENDANT

CORAM: UNYOLO, J.
Chizumila, Counsel for the Plaintiff
Kombezi, Counsel for the Defendant
Phiri, Senior Court Reporter
Mrs. Manondo, Court Interpreter

JUDGMENT

By his amended writ and statement of claim endorsed thereon the plaintiff claims against the defendant a total sum of K123,936.27 made up as follows: (a) the sum of K61,921.31 being the value of building materials supplied by the plaintiff to the defendant; (b) the sum of K50,000.00 being the price of a plot of land sold by the plaintiff to the defendant; and (c) the sum of K12,061.95 being transport charges for conveying the building materials above-mentioned from Blantyre to Lilongwe and for local travel within Lilongwe itself. In his defence the defendant denies owing the plaintiff the said sum of K123,936.27 or at all. He in turn counterclaims against the plaintiff a total sum of K38,314.36 made up as follows: (a) the sum of K10,000.00 being balance outstanding on a loan given by the defendant to the plaintiff; (b) the sum of K2,000.00 being interest on the said loan; (c) the sum of K11,064.36 being expenses incurred by the defendant on behalf of the plaintiff on the plaintiff's plot at Area 7 in Lilongwe; and (d) the sum of K15,000.00 being 10% commission payable to the defendant by the plaintiff on sale by the defendant of the plaintiff's said plot at Area 7 in Lilongwe. The defendant also claims interest on the said sum of K38,314.36 at such rate and for such period as the Court shall deem proper.

I heard evidence from both the plaintiff and the defendant. None of them called any witnesses.



I shall deal first with the plaintiff's claim for the sum of K61,921.31; for value of building materials supplied by the plaintiff to the defendant. The plaintiff is the managing director of a building construction company in Blantyre known as Terrazo and Building Limited. He and the defendant were at all material times the best of friends. The defendant resides in Lilongwe. The plaintiff told the court that at the request of the defendant he procured various building materials in Blantyre and sent them to Lilongwe where the defendant was building a house. The plaintiff tendered in evidence six delivery notes (Exhibits P3-P8) in support of his claim on this aspect. The said delivery notes show the various items the plaintiff says he supplied to the defendant. The matter is simplified by the defendant's admission that he did indeed receive the items herein. Further, the defendant admits that he has to pay for them. He told the Court that he has not paid for the said items because the plaintiff has not produced to him proper invoices or other documents showing the prices of the items and certified by a quantity surveyor. It is the defendant's case that he is ready to pay the amount herein as soon as the plaintiff submits such documents to him. With respect, it appears to me that the defendant simply wants to be pedantic. While admittedly the plaintiff has not produced formal invoices matching the six delivery notes he has however produced the list of the materials supplied to the defendant. According to the uncontroverted evidence the said list, Exhibit P1, was prepared by a quantity surveyor in the employ of the plaintiff's company, already-mentioned, and gives the prices of each one or each set of the building materials listed. It appears that the document was prepared and sent to the defendant as far back as 1990. Significantly, there is no evidence that the defendant queried the document or the prices indicated thereon. I have perused the document and although I am not myself a building contractor or merchant I have no reason to think that the prices indicated are unreal or inflated. As I have already indicated the defendant admits having received the items and he admits having used them in building his house. Further the defendant admits that he did not get the items for free; but was expected to pay for them. He also admits that he has not paid the plaintiff any money in respect of the said building materials. On these facts it is obvious that the defendant has an obligation to pay the plaintiff the K61,921.31 claimed under this head of claim. I find therefore that the plaintiff has proved his case on this aspect and find the defendant liable accordingly.

I now move to the claim for transportation charges in the sum of K12,061.95. As I have already shown, after procuring the building materials the plaintiff conveyed them to the defendant in Lilongwe. It is not disputed the plaintiff used his truck to transport the items to Lilongwe. Again, this was not meant to be a free service; indeed that does not appear to be the defendant's case. It is clear all this was part of the agreement between the plaintiff and the defendant. However the

plaintiff has discovered that the amount claimed, namely the K12,061.95 is inflated in that it includes charges for local use of the truck within Lilongwe. The plaintiff said that transportation charges for trips within Lilongwe were not envisaged. The amount involved in respect of such local trips is K7,345.00 (see Exhibit P8) and the plaintiff has withdrawn his claim to this amount. This sum must therefore be deducted from the global figure of K12,061.95 and that leaves a balance of K4,716.95. It became clear during submissions that the plaintiff had actually understated the amount in respect of the Blantyre-Lilongwe trips. The plaintiff did not however amend his statement of claim in this regard. The court must therefore go by the pleadings. All in all I am satisfied that the plaintiff has proved his claim for transportation charges in the said sum of K4,716.95, for the round trips the plaintiff's truck made between Blantyre and Lilongwe. I find the defendant liable accordingly.

Finally I turn to the plaintiff's claim against the defendant for the sum of K50,000.00 said to be the price of a plot the plaintiff sold to the defendant. Referring to the evidence there is no dispute between the parties that the plaintiff did indeed sell a piece of land in Lilongwe to the defendant. What is in controversy is the amount agreed upon as the price of the land in question. The defendant contends that the price was K7,000.00; and not K50,000.00 as contended by the plaintiff.

The defendant tendered in evidence a bill of costs, Exhibit D1, raised by Messrs. Wilson & Morgan who acted as legal practitioners for both the plaintiff and the defendant in the matter of the sale of the said plot and the transfer of title thereof. The document shows that the legal practitioners were advised the land had been sold for K7,000.00 and they proceeded to levy stamping, registration and other fees and charges based on the said purchase price of K7,000.00. The plaintiff gave an explanation. He told the Court that they mentioned the said figure of K7,000.00 to the lawyers in order to save fees in that had they given the correct purchase price of K50,000.00 the defendant would have paid much more in terms of fees and charges both to the Government and to the lawyers. The plaintiff said that it was the defendant who suggested all this and that he agreed in order to help a friend. He said that the fact however still remained that the purchase price of the plot was K50,000.00 and that the defendant agreed to pay the said sum. The defendant denied this story. Considering the total evidence I am inclined to prefer the plaintiff's evidence to that of the defendant. The uncontroverted evidence shows that the plaintiff bought this very piece of land in March 1986 for K7,000.00. The land is situate in Area 9, Lilongwe, and this is a very attractive residential area. I am inclined to agree with the plaintiff that in all earnest he would not have sold the same piece of land some four years later in 1990 also at K7,000.00. In short I am satisfied that the purchase price agreed between the parties was K50,000.00.

The matter does not however rest there. It is obvious from the foregoing that the plaintiff participated subsequently in an illegal, immoral and reprehensible transaction. Once this was disclosed the court is bound to take notice of it. The rule which is applicable to the matter is "Ex turpi causa non oritur actio" or better still "Ex dolo malo non oritur action" meaning respectively 'no right of action arises from a base claim' and 'no right of action arises out of a fraud'. Indeed it would also be wrong to allow the plaintiff on these facts to use the process of the court to get the best of both worlds. All the same it appears to me that it would be both unjust and inequitable to let the defendant have the piece of land for absolutely nothing. I think that he must pay the K7,000.00. In the result the plaintiff must succeed on this head of claim only to the extent of K7,000.00 and I find the defendant liable accordingly.

The foregoing disposes of the plaintiff's action against the defendant. I now turn to the defendant's counterclaim.

As earlier indicated the defendant counterclaims against the plaintiff first the sum of K10,000.00 being balance outstanding on the sum of K50,000.00 which the plaintiff borrowed from the defendant. Just before the hearing started Mr. Chizumila informed the Court that his client, the plaintiff, admitted owing the K10,000.00. I find therefore that the defendant has proved his counterclaim on this point and find the plaintiff liable accordingly.

The defendant's next claim is for the sum of K2,000.00 being interest on the K10,000.00 just mentioned. As I see it, the defendant's case on this point is fraught with problems. Pleadingswise, the defendant simply stated "Interest on loan - K2,000.00". Such type of pleading offends the provisions of O.18/18/10 of the Rules of the Supreme Court which require that on a claim for interest it must be specifically pleaded whether such interest is claimed under statute or contract or otherwise. The rule goes on to say that where the claim is under a contract, the contractual term relied on must also be pleaded specifically, as should the rate at which and the period for which it is being claimed. And referring to the evidence in the present case, the defendant conceded under cross-examination that the question of interest was neither discussed nor agreed between himself and the plaintiff. The claim here is therefore one which has come out of the blue, so to say. The defendant was not able even to tell the period for which the claim is made. On these facts I am inclined to think that the claim must fail and it is dismissed.

I turn now to the defendant's counterclaim for the sum of K11,064.36. The defendant's case on this aspect was that he had occasion at one time to "look after" the plaintiff's piece of land at Area 7 in Lilongwe. He said that in the process he

spent the amount claimed under this head as the Government authorities in Lilongwe had threatened to confiscate the plot unless it was at once developed. It was the defendant's evidence that in order to show that the plot was being developed he employed workmen to clear the place and build a shack. He also employed a watchman and had water supply connected to the premises. The defendant tendered in evidence several documents such as water and city rates bills (Exhibits D2-D8) in support of his claim on this point. Significantly, the defendant said under cross-examination that he went ahead to do what he did and incur the expenditure herein without any prior agreement with the plaintiff, nor did he consult the plaintiff. There is also no evidence to show that the plaintiff knew about what was happening and that he gave approval, tacit or otherwise, to it. Much as I would sympathise with the defendant I am nevertheless unable to find any basis upon which the claim here can succeed. I therefore have no other option but to dismiss it, which I do.

There is then the penultimate claim for the sum of K15,000.00. The claim relates to the plaintiff's plot I have just mentioned, viz the plot at Area 7 in Lilongwe. The defendant told the Court that after carrying out the minor works I have just described in the preceding paragraph, he was requested by the plaintiff to put the plot up on sale and that he obliged and sold it. The defendant says that he is entitled to 10% commission for doing this job, hence the claim here. The plaintiff admits the plot was indeed sold. He denies however having asked the defendant to sell it for him. He also denies it was the defendant who conducted the sale. The plaintiff says that he handled the transaction himself right here in Blantyre. Of the two parties I thought that it was the plaintiff who came out firm in his evidence on this part which makes me inclined to prefer his evidence to that of the defendant. And even assuming that the plaintiff did instruct the defendant to sell the plot, the defendant, it is to be noted, was unable to tell the Court how he arrived at the rate of 10%. Indeed the defendant said in cross-examination that there was no agreement between him and the plaintiff requiring the plaintiff to pay him 10% commission or any commission for that matter. He said that the matter was not even discussed. On these facts there would in my judgment be no basis upon which the claim on this part would succeed. It is dismissed.

This leaves out the claim for further interest. Like in the previous instance the basis upon which interest is being claimed on this part was not pleaded by the defendant and it has not in any way been substantiated. For the reasons I have given as I dealt with the earlier claim for interest this claim must also fail and it is dismissed.

To recapitulate, I have found for the plaintiff (a) in the sum of K61,921.31 being value of building materials the plaintiff supplied to the defendant; (b) in the sum of K4,716.95 being transportation charges; and (c) in the sum of

K7,000.00 being purchase price of a plot the plaintiff sold to the defendant. This gives a total sum of K73,638.26. And I have found for the defendant in the sum of K10,000.00 being balance on a loan the defendant gave to the plaintiff. This reduces the sum due from the defendant to the plaintiff to K63,638.26 and I enter judgment for the plaintiff for this sum.

Each party will have costs on those matters he has succeeded.

PRONOUNCED in open Court this 12th day of June, 1991 at Blantyre.


L.E. Unyolo
JUDGE