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IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO.929 OF 1990

HIGH COURT
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BETWEEN:

YOHANE ANDREYA PLAINTIFF

- and -

KHUMA WAYS AGENCIES LIMITED DEFENDANT

CORAM: CHATSIKA, J.

Banda, Counsel for the Plaintiff
Chiphwanya (Miss), Counsel for the Defendant
Selemani, Official Interpreter
Maore, Court Reporter

JUDGMENT

In his amended statement of claim, the plaintiff claims the sum of K10,000.00 from the defendants as money had and received from the plaintiff for a consideration which consideration failed. The plaintiff further claims interest at the current bank rate from August, 1990 until payment is made in full. He also claims the costs of this action.

The defendants admit receiving the sum of K10,000.00 from the plaintiff but deny any liability to pay the same back to the plaintiff. In their defence, the defendants state that they had entered a purchase contract with the plaintiff whereby the plaintiff was to purchase a maize mill from the defendants at a price of K18,500.00. It was a term of the verbal contract that upon the purchaser paying a deposit of ¼ of the purchase price the seller would deliver the mill to him and that the balance of the purchase price would be paid by instalments of an agreed amount paid over an agreed period. The defendants further allege that it was a further term of the contract that in the event of the purchaser failing to pay up to ¾ of the purchase price, he would lose any deposit that he may have paid. The defendants state that K10,000.00 was less than ¾ of the purchase price and that the plaintiff failed to pay up to the required amount and was in breach of the contract and accordingly and in terms of the contract he lost the deposit.

The defendants counterclaim the sum of K8,500.00 which was the balance of the purchase price and costs of the action.

HIGH COURT
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The plaintiff told the Court that early in July, 1990 he went to the defendants' premises and made enquiries about the type of mills which they had in stock and their prices. He was interested in a Lister 25 H.P. water cooled mill. On the 10th July, 1990 he paid K3,000.00 as deposit towards the purchase of this mill and on the 8th August, 1990 he paid another K7,000.00 making a total deposit of K10,000.00 towards the purchase of the mill. It may be observed that on the bottom of the receipt in respect of the payment of the K7,000.00 the words "Deposit Not Refundable" were stamped. These words were not stamped on the earlier receipt for K3,000.00.

The witness continued to tell the Court that when he paid the amount of K7,000.00, he was informed by the defendants' representative that he had paid enough money as a deposit and that the defendants would deliver the mill to him and the balance of the purchase price would be paid by instalments. He was told that a motor vehicle was going to Lilongwe on the same day to collect the mill and that he should call on them on the following day to see if the mill would have arrived. The witness called on the following day and the mill had not arrived from Lilongwe. He left for Ntcheu and told his son to keep on checking at the defendants' premises and to send him a message when the mill would have arrived so that he could come to Blantyre and collect it. No such message reached him. He came back to Blantyre and personally checked with the defendants for several days but on each day he was told that the mill had not arrived.

He continued to tell the Court that when he was tired and was pressing the defendants to deliver the mill to him, the defendants offered to deliver to him a mill which was in their shop which was used as a sample for advertisement. The mill was not working as it did not have certain important parts. The defendants told the plaintiff that they would collect the necessary parts from Chigumula and that if the witness called again he would find the mill in working condition. The plaintiff called on the defendants on the following day only to find that the parts had not been fitted. He then became impatient and frustrated and handed over the matter to his lawyers.

The plaintiff told the Court that the agreement between him and the defendants was for the purchase of a new mill and that at no time was there any suggestion that the mill he was intending to purchase would be a used one.

In cross-examination the plaintiff denied that there was any agreement between him and the defendants that he should pay up to $\frac{3}{4}$ of the purchase price before the mill could be delivered to him and that failure to do so would result in the

loss by him of the deposit which he had paid. He also denied that his attention was drawn to the words "Deposit not Refundable" which were stamped on the receipt for K7,000.00 and stated that at no time did he enter into any discussions in which the significance of those words was brought to his attention.

The second witness for the plaintiff was the plaintiff's son, Andreyah Yohane. His evidence except in certain minor details, confirmed that of the plaintiff.

The defence called only one witness Mr. Tass Kaunda. He was, at the material time, the defendants' Sales Manager and the person who dealt with the plaintiff in the matters related to this case. He told the Court that after making the preliminary enquiries the plaintiff paid the sum of K3,000.00 on the 10th July, 1990 as a deposit towards the purchase of a mill costing K18,500.00. He said that on the 8th of August, 1990 the plaintiff came and paid an additional deposit of K7,000.00 making a total of K10,000.00.

Mr. Kaunda told the Court that after the payment of K7,000.00 the plaintiff asked the defendants whether he could not be allowed to take possession of the mill even though the total deposit had not reached the required $\frac{3}{4}$ of the purchase price. Mr. Kaunda stated that after considering that the man had paid K10,000.00 which was a lot of money, the defendants waived the requirement to pay a deposit of $\frac{3}{4}$ of the purchase price before he could collect the mill and allowed him to collect the mill.

Mr. Kaunda continued to tell the Court that at that time they did not have in stock at their Limbe Depot the type of mills which the plaintiff wanted to buy. These were kept at their Lilongwe Depot. The Defendants told the plaintiff that they were sending their vehicle on the same day and that the plaintiff should call on them on the following day when it was hoped that the mill would have arrived. Between the 9th August, 1990 and the 17th August, 1990, the plaintiff called on the defendants several times and on each occasion he was told that the mill had not arrived and the plaintiff was becoming both impatient and suspicious as to whether the mill would ever arrive at all. The plaintiff was told that the mill would be delivered to him on the 17th August but when he called at the defendants' premises on this day, he was told that the mill had not arrived but that it would be ready on the 22nd August. The plaintiff then demanded the refund of his money. Mr. Kaunda stated that on the 22nd August, 1992 the plaintiff called on the defendants and found that the engine had arrived. It could, however, not be delivered to the plaintiff because the

mechanic who used to start the engines was not there and it could not be given to the plaintiff before it was proved in the presence of both the plaintiff and the defendants that it was in working order. As the mill could not be started the plaintiff became angry and impatient and demanded the refund of his deposit. The defendants told the plaintiff that they could not refund his deposit because the mill had arrived and that they were ready to deliver it to him as soon as it was started and proved to be in working order. Mr. Kaunda said that the plaintiff left and for some time he did not call at their premises.

The witness stated that after the defendants had been served with a writ in respect of this matter the plaintiff called at their premises and said that he wanted to discuss the matter so that he could have his mill. The defendants refused any discussion with him about the matter on the grounds that the matter was in the hands of the Court and that they could not conduct any discussions on the subject until the matter had finally been decided.

When Mr. Kaunda was asked in cross-examination whether the defendants still demanded from the plaintiff the balance of the purchase price of K8,500.00, his answer was, "how can we demand that money when the sale of the mill did not take place" As it will be observed later in my judgment, I took this answer to mean a complete abandonment of the defendants counter-claim.

Before I analyse the evidence and decide the issues involved, I must commend Mr. Tass Kaunda for the manner in which he gave his evidence. He was an honest and an unbiased witness. His evidence was clear and did not, in any way make any attempt to mislead the Court. It is extremely rare to come across a witness of this calibre.

From the evidence before the Court, I find that the plaintiff paid K10,000.00 as a deposit towards the purchase of a mill costing K18,500.00. I also find it as a fact that after the payment of this deposit the defendants agreed to deliver the mill to him and that the balance of the purchase price would be paid by instalments. I also find it as a fact that the defendants waived their term of the contract - if such a term in fact ever existed - which required the purchaser to pay up to $\frac{3}{4}$ of the purchase price as deposit before the mill was delivered to him.

The question which must now be resolved is why was the mill not delivered when all parties had agreed that it should be delivered. It looks rather odd that a mill which was in Lilongwe could not be delivered in Limbe from the 8th August,

1990 up to the 17th August, 1990 and again from 17th August, to the 21st August especially so when transport was sent to collect it. No forcible explanation has been given to justify this unjustifiable delay. The logical conclusion in the circumstances is that the defendants did not have a mill of that description to sell to the plaintiff. Even at the time when they were receiving the deposits they did not have a mill. They may only have been entertaining a forlorn hope that before the plaintiff paid the required deposit they would have obtained a mill of that description. As it turned out, they didn't.

It has been suggested by the defence that the plaintiff repudiated the contract before the time of its performance had expired and that as he was the guilty party he should forfeit the deposit which he paid. A number of authorities were cited to the Court for this proposition. While this submission and the authorities which have been cited in its support properly explain the position in law unfortunately it does not fit into the facts of this case. Although the statement of claim states that the contract was to be performed during the month of August, 1990, the evidence both from the plaintiff as well as the evidence of Mr. Kaunda for the defence overwhelmingly showed that on the 8th August the defendants had promised that the mill would be delivered on the 9th August. The plaintiff checked with the defendants on the 9th August and on two more subsequent days when he was told that it would be delivered on the 17th August. On this date the mill was not available and he was told to check on the 22nd August. On this date he was shown a sample of a mill which did not have certain essential parts and could not work. It is clear in my mind that throughout all this period the defendants did not have a mill to deliver to the plaintiff. When the plaintiff became impatient after being given all these false promises and decided to hand over the matter to his lawyers he cannot be said to have unilaterally repudiated the contract.

In HOWE -v- SMITH (1884), Vol.27, Ch.D 89, it was held that a deposit although to be taken as part payment if the contract is completed, was also a guarantee for the performance of the contract and that the plaintiff, having failed to perform his contract within a reasonable time, had no right to the return of his deposit. (See also CHILLINGWORTH -v- ESCHE (1923) 1QB 576).

In the present case the plaintiff did not fail to perform his contract let alone within any specified time. He was not even required to pay up to $\frac{3}{4}$ of the purchase price as this requirement was waived by the defendants. It was the defendants who failed to perform their part of the contract. The consideration for which the plaintiff paid the K10,000.00

failed completely. I therefore find the defendants liable for the failure of the consideration. It is, therefore, adjudged that the defendants do pay the plaintiff the sum of K10,000.00.

In his statement of claim the plaintiff also claims interest on the sum of K10,000.00 from August, 1990 until payment is made in full at current bank lending rate. It has been argued that the plaintiff's money, prior to the time it was paid to the defendants, was in the bank where it was earning interest. It was drawn from the bank and paid to the defendants because the plaintiff hoped to obtain a mill which he could use to earn more money than the interest he was earning from the bank. It is also to be observed that the defendants have derived financial benefit by that money. The defendants cannot be allowed to obtain that benefit at the expense of the plaintiff.

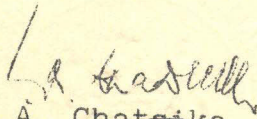
It has been observed from the evidence that because the plaintiff was desirous to possess a mill, he looked for, and found one at B & C Company Ltd. He drew some money from his bank account and bought the mill. It is clear that had the defendants refunded his money at that time, he would have used it to purchase the other mill without having to draw money from his bank where it was earning interest.

This Court can exercise its equitable jurisdiction to grant relief in a case such as this one. It is therefore adjudged that the plaintiff do recover interest at the present bank lending rate from the 1st September, 1990 up to today's date the 12th November, 1992 which will be calculated and agreed between the plaintiff and the defendants.

With regard to the counter-claim, it became clear after the defence witness, Mr. Tass Kaunda, gave evidence that the same could not be pursued further. Miss Chipwanya in her submission declined to say anything about it. There is no evidence on record to support the claim for the counter-claim. In fact, its inclusion appears to have been a misconception. The counter-claim is therefore dismissed with costs.

The plaintiff is entitled to the costs of the whole case.

PRONOUNCED in open Court this 18th day of November, 1992, at Blantyre.


L.A. Chatsika
JUDGE