

10 Feb 1992

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.958 OF 1990



BETWEEN:

J.H. KOREIA.....PLAINTIFF

- and -

DR. J.A. JANA.....DEFENDANT

Coram: MKANDAWIRE, J.

Ng'ombe, Counsel for the Applicant
Nyirenda, Counsel for the Respondent
Kaundama, Official Interpreter
Longwe, Court Reporter



O R D E R

The defendant is indebted to the plaintiff in the sum of K83,112.30. This is now an application that he be allowed to pay this debt by instalments of K500.00 per month. At this rate it will take him over 13 years to pay.

Perhaps I should give a brief outline of the circumstances in which the debt was incurred. Early in 1989 the defendant agreed to sell and the plaintiff agreed to buy a house situated on Plot No. LE.112, BCA Hill, Limbe at a price of K80,000.00. The defendant did not disclose that the property was encumbered. As a matter of fact, the property was mortgaged to Indefund Limited and a loan of K71,398.30 was outstanding. In his letter dated 7th March, 1989 addressed to the plaintiff, the defendant said he would sell the property free from encumbrances. Although he did not specifically inform the plaintiff that the property was mortgaged, at paragraph 6 of this letter the defendant said that he would apply the deposit of K40,000.00 to redeem the mortgage. By that time the plaintiff had already paid K30,000.00 towards the purchase price. By April, 1989 the plaintiff had paid K70,000.00. The defendant did not use the purchase price to redeem the mortgage. When government consent was obtained in August, 1989 the defendant could not convey as the mortgage was not discharged. Then Indefund Limited threatened to sell and the plaintiff had to pay K8,000.00 to Indefund Limited to stop them from selling. He suffered further expenses and the total amount paid came to K83,112.30.

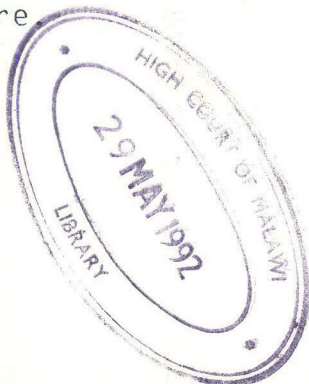
It is in these circumstances that Mr. Nyirenda has submitted that the application be dismissed, for the defendant has been fraudulent. Mr. Ng'ombe does not agree that his client has been fraudulent. It is Mr. Ng'ombe's submission that had the plaintiff made any search he would have easily discovered that the property was mortgaged. Whether the defendant acted fraudulently or not, it cannot be said that he was honest. It is true that had the plaintiff made any search he would have discovered that the property was mortgaged, but was the defendant being honest when he said he would sell the property free from encumbrances? In his letter of 7th March, 1989 he said he would apply the deposit of K40,000.00 to redeem the mortgage, giving the impression that the balance on the mortgage was only K40,000.00, when in fact it was over K70,000.00. He did not use any of the money paid by the plaintiff to redeem the mortgage. He must have used that money for other purposes. When Indefund Limited finally decided to sell, he went to New Building Society and obtained another mortgage to pay off Indefund Limited. The purported sale could not go ahead, hence this debt.

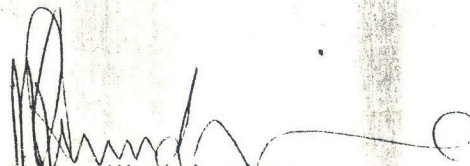
These are the circumstances of this debt. I do not think it would be fair and equitable to allow the application. Worse still, the defendant is busy disposing of his other properties. In 1990 he conveyed to his wife a house on Chilambe Estate Block 5B on a consideration of "Love". The wife is receiving monthly rental of K1,500.00 on this property. In November, 1991 the defendant sold his other property on Plot No. LE.568, BCA Hill, Limbe. I think Mr. Nyirenda was perfectly correct in submitting that the defendant is doing all this to frustrate and defeat his creditors.

What is now a debt was not intended to be a debt, but a purchase price. The defendant, having made easy and quick money, seeks the assistance of this Court so that he pays back the money by instalments. To say the least, this is most unfair and inequitable. Even if he pays K25,000.00, which is the balance of the purchase price on Plot No. LE.568, BCA Hill, Limbe, there will still be a balance of over K58,000.00, which would take over 9 years to pay.

In the result, the application is dismissed with costs.

PRONOUNCED in open Court this 10th day of February, 1992, at Blantyre




M.P. Mkandawire
JUDGE