

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 527 OF 1988

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BETWEEN:

AUTOCRAFT (FIRM).....PLAINTIFF

:

- and -

Y M TUTLA.....DEFENDANT

CORAM: MKANDAWIRE, J.

Chizumila, of Counsel, for the Plaintiff
Kumange, of counsel for the Defendant
Kaundama, Official Interpreter
Phiri, Court Reporter

J U D G E M E N T

In this action the plaintiff is claiming the sum of K27,500.00, being the balance of monies advanced by the plaintiff to the defendant. In his defence the defendant denied having advanced K27,500.00, or at all, from the plaintiff, but pleaded further that if there was any advance at all, then the money was taken by Mr A G K Aboo.

The case was set for hearing on Monday, 2nd March, 1992, but instead trial commenced on 4th March, because Mr Kumange was not available. His explanation was that he was not aware that the case had been set down for 2nd March. The plaintiff then gave his evidence and closed his case. Mr Kumange said he was not ready with his defence, as he had not got in touch with his client. As a result, he applied for adjournment. Mr Chizumila had no objection to the request, but it was agreed that the case be adjourned to a specific date. I then asked Counsel to agree on a date. Both Counsel went through their diaries and agreed on 20th March, 1992, and the case was adjourned to that date.

When the 20th March, 1992 came, Mr Kumange was nowhere to be seen. He did not warn his learned colleague that he could not attend and he did not advise the Court of his failure to attend. Mr Chizumila expressed disappointment, because that was a date which was specifically agreed between themselves. It was not a date that was imposed on them by the Court. Mr Chizumila indicated that he had considered asking the Court to proceed to judgement, but finally thought of giving the defendant some chance. He ended up applying for adjournment and the

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case was adjourned to a date to be fixed by the Registrar. The case was then set down for hearing on 6th April, 1992. Mr Kumange did not appear and his client was also not there. Mr Kumange was fully aware of this date. Mr Chizumila informed the Court that on Thursday, the 2nd of April, he personally talked to Mr Kumange on the phone and reminded him that the case was coming up on the 6th of April, 1992. Both the Court and the plaintiff did not know why Mr Kumange failed to come, as there was no word from him. It was in these circumstances that Mr Chizumila applied that the Court do proceed to deliver judgement, as the plaintiff had already given his evidence. He made the application under O.35/1 of the Rules of the Supreme Court.

From the information before me, I am satisfied that Mr Kumange was fully aware that the case had been set down for 6th April, 1992. He did not attend and no reason was given. We all do have problems and if Mr Kumange had a problem, then he should have had the courtesy of advising his learned colleague or the Court, or both. This was the second time that Mr Kumange and his client stayed away and on both occasions no reasons were given. In these circumstances, I grant Mr Chizumila's application and I shall proceed to judgement.


The plaintiff's case is a straightforward one. The only witness for the plaintiff was Mr Mahesh Kumar Patel, PW1. He is the plaintiff's accountant and he has served in that capacity since 1985. He is the most senior officer in the accounting department and he is responsible for all accounting duties. It was his evidence that the defendant had borrowed the sum of K75,000.00 from the plaintiff. He said there was a letter from the defendant acknowledging receipt of this money. At this point, Mr Chizumila rose and informed the Court that the letter of acknowledgement had really been handed to him, but it was misplaced when he was moving from Lilly Wills & Company to open his own firm. The witness went on in his evidence and said that at some stage the defendant paid K10,000.00, leaving a balance of K65,000.00. The defendant then made out three post-dated cheques in the sum of K20,000.00, K20,000.00 and K25,000.00. One of those cheques were paid by the bank, but two were returned with "Refer to Drawer". The cheques that were dishonoured are No. 317615 for K25,000.00 dated 15th August, 1987, and No. 317616 for K20,000.00 dated 30th August, 1987. These were tendered in evidence as Exhibits P2 and P3 respectively. The three post-dated cheques were accompanied with a covering note dated 21st July 1987 and tendered as Ex.P1. When those two cheques were dishonoured, the balance outstanding was K45,000.00, but at a later stage the defendant paid K17,500.00, thus reducing the balance to K27,500.00, which the plaintiff is now claiming. The witness wound up his evidence by saying that he was present when the defendant borrowed the K75,000.00, and it was the defendant himself who collected the money. He also told the Court that it was the defendant himself who personally gave the post-dated cheques.

In cross-examination, the plaintiff maintained his story, saying it was the defendant who borrowed the money and who gave the post-dated cheques. The witness said he did not know Mr Aboo. Indeed, nothing of substance arose in cross-examination that could shake the plaintiff's evidence.

I had the privilege of observing the witness in the witness box and he struck me to be a man who was telling the truth. He was present when the defendant got the money and it was the defendant who personally made out the post-dated cheques. I note that the acknowledgement letter was misplaced, but that cannot be fatal, in view of the other available evidence. I, therefore, find it as fact that the defendant did borrow the sum of K75,000.00 from the plaintiff and that K47,500.00 has been paid, leaving a balance of K27,500.00.

I, therefore, enter judgement for the plaintiff in the sum of K27,500.00. The defendant is condemned in costs.


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



M P Mkandawire
JUDGE

MR KUMANGE: I apply that extension be stayed till I apply for judgement to be set aside.

COURT : There must be a formal application.



M P Mkandawire
JUDGE