

IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NO. 98 OF 1988



BETWEEN

B.P. KANDOTA PLAINTIFF

AND

NATIONAL BANK OF MALAWI DEFENDANT

CORAM: KALAILE, J

For the Plaintiff, Kadzakumanja
For the Defendant, Chiligo
Court Clerk, Tembo (Ms)



J U D G M E N T

The Pleadings

The plaintiff's statement of claim averred that -

1. The plaintiff was at all material times a farmer owning Chipanga Estate and the defendant is a bank registered under the Banking Act. (Cap. 44:01) of the Laws of Malawi.
2. By an oral agreement the plaintiff borrowed money for growing tobacco and in turn issued a Farmer's Stop Order Registered Number 1637 and dated 3rd January, 1978.
3. Consequent upon such stop order, all proceeds of the tobacco sales from the plaintiff were sent to National Bank, Capital City Branch who received the money as agent of the plaintiff.
4. The plaintiff discharged all his debts for which the stop order was made the same year 1978.

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5. In spite of the discharge of debt the defendant has not issued either cancellation or satisfaction notice of the Stop Order as by law required.
6. The defendant as such agent by virtue of the Farmers Stop Order received large sums of money including K2,753.79 received on 12th May, 1988 for which it refuses to account.
7. The defendant refuses to release to the plaintiff his statements.
8. The plaintiff therefore claims/prays for -
 - (i) an account of all sums received and paid by the defendant as banker and agent of the plaintiff.
 - (ii) Payment of K2,753.79.
 - (iii) Payment of the account found due to the plaintiff on taking such account with interest.
 - (iv) Cancellation of stop order Registered No. 1637.
 - (v) Costs for this action."

To this, was a reply and defence to counterclaim.
It reads -

1. The plaintiff denies owing the defendant the sum of K178,233.32 or any part thereof and put the defendant to strict proof thereof.
2. The plaintiff joins issue with the defendant on his defence.

Defence to Counter-claim

3. The plaintiff denies owing the defendant the sum of K178,233.32 or any part thereof in either his personal capacity or as guarantor and puts the defendant to strict proof thereof.
4. Further the plaintiff states that in so far as the counterclaim is brought six (6) years after the contract the same is statute barred under s. 4(1) and (2) of the Limitation Act (Cap.4:02) of the Laws of Malawi and prays that the same be dismissed with costs.

5. In the alternative, the plaintiff denies that there was a contract of guarantee between him and the defendant and if there was the same was void for lack of consideration.
6. Further or in the alternative if there was indeed a contract of guarantee the same was void for lack of principal debtor.
7. The defendants either unduly influenced the plaintiff or consent proceeded to form Chipanga Estate Limited to which they advanced sums of money and at such time the said Chipanga Estate was a puppet of defendants.
8. In so far as Stop Order No. 1637 was issued for debt incurred in 1977 it is void for lack of consideration.
9. The plaintiff therefore prays that the counterclaim be dismissed with costs."

THE FACTS

I shall not outline the defendant's pleadings since these are adequately dealt with in the defendant's submissions. So I shall delve into the facts.

It is not disputed that the plaintiff, a tobacco farmer, borrowed several sums, on divers dates from the National Bank with effect from 1977 at the defendant's Capital City branch in Lilongwe, for the purpose of growing tobacco. As security for the payment of such advances, the plaintiff issued Exhibit P2 being a Farmer's Stop Order dated 3rd January 1978 and which was registered as number 1637. The issuance of Exhibit P2 meant that the plaintiff's tobacco proceeds were to be deducted at source by Auction Holdings Ltd and remitted to the defendant's Capital City Branch in satisfaction of the advances which were subsisting.

One of the contentious issues was that the plaintiff contended that in 1978, he satisfied all debts for which Exhibit P2 was issued. Throughout the trial, it was the plaintiff's argument that the defendants did not furnish him with statements of his account. The plaintiff conceded under cross examination and when giving evidence in chief

that he was indebted to the defendants but the level of indebtedness was obscure because of the frequent enhancements of the interest rates which the defendants levied as and when they are pleased. The plaintiff's evidence regarding the haphazard interest rates can be found at page 8 of the court record.

According to the defendant's submissions, it was the plaintiff's continued indebtedness to the defendant that prompted the defendant to propose that the plaintiff should create a limited liability company, Chipanga Estates Limited which would take over the plaintiff's tobacco farming operations. The company was duly incorporated on 2nd December 1977 - this is Exhibit P17.

It is not in dispute that after incorporation, the company started growing tobacco on the land which was formally the leasehold property of the plaintiff. Indeed, the quota and the licence to grow tobacco still remained in the plaintiff's name. The plaintiff now question the manner in which the company was established in paragraph 7 of the defence to the counterclaim by submitting that there was undue influence on the plaintiff and Chipanga Estate Limited was a "puppet" of the defendants.

In connection with the formation of Chipanga Estates Ltd., the plaintiff testifies at page 18 of the court record that -

"I did not produce these minutes, but I signed them in the office of the bank manager. I tender the minutes as part of my evidence - marked Exhibit P18 (dated 5th February 1978).

Witness shown a document called a guarantee - it was prepared by the bank and I signed for it with two others, myself, my wife and Ellen Kandota my daughter, it is dated 12th February 1979. My daughter was 12 years old in 1979."

It was submitted by the defendant's counsel that although it was intended that all the tobacco farming operations be carried on by the company, including the operation of the banking account at the Capital City Branch in Lilongwe, the company and the plaintiff were carrying on the tobacco farming operations side by side. Indeed, the plaintiff testified that he continued growing tobacco in his personal name during

the growing seasons 1977-78,, 1978-79, 1979-80 and 1981-82. However, to all intents and purposes, all advances subsequent to the incorporation of the company were being given to the company in its name.

It was further submitted by the defendant that the plaintiff having continued being indebted to the defendant even after the incorporation of the company, Exhibit P2 being the Farmer's Stop Order continued to be in force.

Issues for Determination

The defendant's counsel argued that the plaintiff's three causes of action are statute barred by virtue of ss.4(1) and 4(2) of the Limitation Act, in that the present proceedings were commenced in 1988 which is ten years after the causes of action had accrued. Counsel for the plaintiff did not address me on this point with the submissions of the defendant's counsel save for the fact that I would have put the accrual date as the occasion when the plaintiff was barred from drawing funds from his account on 2nd December 1977 when he was persuaded to form Chipanga Estates Limited.

Another issue for determination is how the defendants computed the interest rates for the debt to accumulate to the intimidating figure of K179,999.85 when no effort was made by counsel for the defendant to explain how this figure was arrived at in the counterclaim apart from producing Exhibit P3. It is no use merely telling the court that the manager informed the plaintiff that this was the level of his indebtedness to the bank when no attempt is made to illustrate how the interest rates attained that level. The defence should have adduced evidence on a balance of probabilities so as to establish that figure.

Counsel for the defendant states in his submissions at page 7 that --

"By the plaintiff's legal practitioner's letter of 30th April, 1987, addressed to the defendant, being Exhibit P15, the plaintiff admitted owing the defendant the sum of K179,999.85 under guarantee, Exhibit P19."

My answer to counsel's submission is that please see paragraph 7 of the plaintiff's statement of claim. At page 9 of the court record, the plaintiff testified that -

"In 1980-81, I stopped growing as I could not pay my employees. But I started in 1984-5 again to grow tobacco with six tenants. I sent the tobacco to Auction Holdings but got no money. I forget what I earned as I have no sales sheets. The bank sent no statement during this period."

Again at page 11 of the court record is the following passage which provides the plaintiff's testimony -

"I was told to sublease to other Africans, so I found Alexander Amos Chikatipwa Phiri. Proper documentation for sub-leasing were made by Mr Pitt for the bank. Phiri started farming. The bank must have copies of the sub-leasing agreement."

Mr Phiri was supposed to pay 10% of the proceeds to reduce my overdraft and I would receive statements from the bank. After one year, I got no bank statement. I wrote the bank about this so as to know my balance. I received no reply."

Whereas it is not quite correct to state that the bank did not give the plaintiff bank statements at all, those statements were given to the plaintiff at random. The following passage at page 22 when the plaintiff was testifying is typical-

"Shown to documents which are statements from Auction Holdings sent to me for the year 1990. I got into my account K65,967.16, from the sales. The bank gave me no statement. From that figure I got two-thirds paid to me. I do not know what happened to the third. Statement is put in as part of evidence and marked Exhibit P33."

Lastly at page 25 of the court record, the plaintiff testified whilst under cross examination that -

"The bank refused the K15,000 offer but I made payments for which I received no statements. I agreed to pay the bank K80,000. I know the bank charges interest and the debt grew because of interest."

As can be noted from this passage the plaintiff does not dispute that the bank charges interest. But where in the defendant's testimony is it established how the periodic interest rates reached the figure of K179,999.85? On these grounds, I do not see how the counterclaim for K179,999.85 can succeed.

I now turn to the sum of K2,753.79 which the plaintiff claims was paid into the Capital City Branch account on or about 12th May 1988 (see page 21 of the court record). It was the evidence of the plaintiff at page 21 that -

"Exhibit P11 shows bank got K2,933.22. This was on 31st May 1988. Witness shown letter dated 12th May 1988 from Kumange and Company to National Bank in connection with Stop Order. Letter tendered in evidence and marked Exhibit P29."

This evidence does not support the averments stipulated in paragraph 6 of the plaintiff's statement of claim, especially since the plaintiff proceeds to state in the same paragraph that he was given two-thirds of that sum and the balance of one third was retained by the bank as agreed.

Points of Law

Although I have ruled out that the mainstay of the plaintiff's causes of action are statute barred and that the claim for K2,753.79 cannot be supported by the evidence on record, I wish to make some obiter dicta on certain issues which Mr Kumange raised in his submissions regarding the law on guarantees and undue influence by commercial banks (see paragraphs 6 and 7 of the defence to counterclaim). Mr Kumange cited a host of decided English cases but I believe that most of the principles which are raised in those cases are exhaustively discussed in the relatively recent House of Lords case of Barclays Bank plc v. O'Brien and Another 3 WLR (1993) 786.

The facts of the O'Brien case were lucidly summarised by Lord Browne - Wilkinson as follows. Mr and Mrs O'Brien were husband and wife. The matrimonial home, 151 Farnham Lane, Slough, was in their joint names subject to a mortgage of approximately £25,000 to a building society. Mr O'Brien was a Chartered Accountant and had an interest in the company, Heathrow Fabrications Ltd. The company's bank account was

at the Woolwich Branch of Barclays Bank. In the first three months of 1987 the company frequently exceeded its overdraft facility of £40,000 and a number of its cheques were dishonoured on presentation. In discussions in April 1981 between Mr O'Brien and the manager of the Woolwich Branch, Mr Tucker, Mr O'Brien told Mr Tucker that he was remortgaging the matrimonial home: Mr Tucker made a note that Mrs O'Brien might be a problem. The overdraft limit was raised at that stage to £60,000 for one month. Even though no additional security was provided by 15th June 1987, the company's overdraft had risen to £98,000 and its ~~cheques~~ were again being dishonoured.

On 22nd June 1987, Mr O'Brien and Mr Tucker agreed (1) that the company's overdraft limit would be raised to £135,000 reducing to £120,000 after three weeks, (2) that Mr O'Brien would guarantee the company's indebtedness and (3) that Mr O'Brien's liability would be secured by a second charge on the matrimonial home.

The necessary security documents were prepared by the bank. They consisted of an unlimited guarantee by Mr O'Brien of the company's liability and a legal charge by both Mr and Mrs O'Brien of the matrimonial home to secure any liability of Mr O'Brien to the bank. Mr Tucker arranged for the documents, together with a side letter, to be sent to the Burnham branch for execution by Mr and Mrs O'Brien. In a covering memorandum, Mr Tucker requested the Burnham branch to advise the O'Briens as to the current level of the facilities afforded to the bank (£107,000) and the projected increase to £135,000. The Burnham branch was also asked to ensure that the O'Briens were "fully aware of the nature of the documentation to be signed and advised that if they are in any doubt they should contact their solicitors before signing".

Unfortunately the Burnham Branch did not follow Mr Tucker's instructions. On 1st July, Mr O'Brien alone signed the guarantee and legal charge at the Burnham Branch, the document simply being produced for signature and witnessed by a clerk. On the following day Mrs O'Brien went to the branch with her husband. There were produced for signature by Mrs O'Brien, the legal charge on the matrimonial home together with a side letter which reads:

"We hereby agree acknowledge and confirm as follows:
(1) That we have each received from you a copy of the guarantee dated 3rd July 1987 (a copy of which is attached hereto) under which Nicholas Edward O'Brien

guarantees the payment and discharge of all moneys and liabilities now or hereafter due owing or incurred by Heathrow Fabrications Ltd to you. (2) That the liability of the said Nicholas Edward O'Brien to you pursuant to the said guarantee is and will be secured by the legal charge dated 3rd July 1987 over the property described above made between

(1) Nicholas Edward O'Brien (2) Nicholas Edward O'Brien and Bridget Mary O'Brien and (3) Barclays Bank Plc. (4) That you recommended that we should obtain independent legal advice before signing this letter."

In fact the Burnham Branch gave Mrs O'Brien no explanation of the effect of the documents. No one suggested that she should take independent legal advice. She did not read the documents or the side letter. She simply signed the legal charge and side letter and her signature was witnessed by the clerk. She was not given a copy of the guarantee.

The company did not prosper and by October 1987 its indebtedness to the bank was over £154,000. In November 1987 demand was made against Mr O'Brien under his guarantee. When the demand was not met, possession proceedings under the legal charge were brought by the bank against Mr and Mrs O'Brien. Mrs O'Brien sought to defend these proceedings by alleging that she was induced to execute the legal charge on the matrimonial home by the undue influence of Mr O'Brien and by his misrepresentation. The trial judge, Judge Marder Q.C., and the Court of Appeal rejected the claim based on undue influence: on the appeal to the House of Lords, the claim based on undue influence was not pursued. However the judge did find that Mr O'Brien had falsely represented to Mrs O'Brien that the charge was to secure only £60,000 and that even this liability would be released in a short time when the house was remortgaged. On those findings of fact, the trial judge granted an order for possession against Mrs O'Brien holding that the bank could not be held responsible for the misrepresentation made by Mr O'Brien.

This then is what Lord Browne-Wilkinson gave as the ratio decidendi of the House of Lords decision:

"I can therefore summarise my views as follows. Where one cohabitee has entered into an obligation to stand as surety for the debts of the other cohabitee and the creditor is aware that they are cohabitees:

(1) the surety obligation will be valid and enforceable by the creditor unless the suretyship was procured by the undue influence, misrepresentation or other legal wrong of the principal debtor; (2) if there has been undue influence, misrepresentation or other legal wrong by the principal debtor, unless the creditor has taken reasonable steps to satisfy himself that the surety entered into the obligation freely and in knowledge of the true facts, the creditor will be unable to enforce the surety obligation because he will be fixed with constructive notice of the surety's right to set aside the transaction; (3) unless there are special exceptional circumstances, a creditor will have taken such reasonable steps to avoid being fixed with constructive notice if the creditor warns the surety (at a meeting not attended by the principal debtor) of the amount of her potential liability and of the risks involved and advises the surety to take independent legal advice.

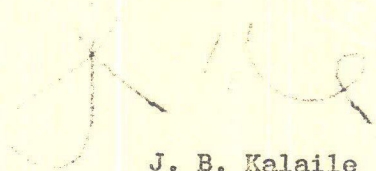
I should make it clear that in referring to the husband's debts I include the debts of a company in which the husband (but not the wife) has a direct interest."

Now, then, does the decision in the O'Brien case affect the Kandota case? Assuming that the Kandota case was not statute barred (save for the sum of K2,753.79 which fails on different grounds), the wife or the daughter (but not the plaintiff could have succeeded in having the guarantee set aside on the grounds that they were not advised to obtain independent legal advice by the creditor. Nonetheless, both the wife and the daughter cannot succeed in having the guarantee set aside should they contemplate to do so because the wife and daughter have a direct financial interest in Chipanga Estate Ltd.

The plaintiff's claims fail in their entirety and the counterclaim cannot succeed either. I make no order as to costs.

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PRONOUNCED in open court this 3rd day of November,
1944 at Lilongwe.



J. B. Kalaile
JUDGE