C. J. 11-05-94

1618

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 340 OF 1993

BETWEEN:

J P KUBWALO (MALE).....PLAINTIFF

- and -

BLANTYRE PRINTING & PUBLISHING CO. LTD.....DEFENDANTS

CORAM: MTEGHA, J.
Nakanga, of Counsel, for the Plaintiff
Zimba (Miss), of Counsel, for the Defendants
Nakhumwa, Official Interpreter
Mikanda, Recording Officer

J U D G M E N T

The plaintiff in this case is claiming the sum of K12,500.00 and damages for breach of contract. The defendants deny any liability.

The plaintiff told the Court that he is the Managing Director of Kusali Studios, a company which processes photographic films and operates other ancillary activities. The defendants, on the other hand, own Times Bookshop situated along Victoria Avenue in the City of Blantyre. Behind Times Bookshop there is a building which the plaintiff was desirous to rent. He went to see the building. He saw that it was a large hall with no water and electricity. For purposes of his business, the hall had to be partitioned into offices and had to be darkened. Water had to be brought in. He was satisfied with the building and he told the General Manager of Times Bookshop that he would occupy the building. The General Manager referred him to the Company Secretary for the defendants, Mr Ntonya. He went to see Mr Ntonya. After the discussions with Mr Ntonya, it was agreed that for the purposes of bringing in water, the plaintiff would provide materials and the defendants would provide labour and that the rent would be K500.00 per month. After these discussions, the plaintiff went back to his office and wrote this letter, dated 16th September 1992:

"Dear Sir

RENT EX-GRAPHIC LINTAS OFFICES - VICTORIA AVENUE

I refer to your verbal offer for us to rent the above premises.

This is to confirm that we are indeed interested and we are looking forward to occupy the offices as soon as we sign the necessary documents with you. Meanwhile, kindly recall our conversation in which you advised us to proceed with repairs in the offices using your maintenance section. This is being done and receipts will be presented to you when work is completed."

The plaintiff went on to say that they agreed with Mr Ntonya that the necessary documentation would be done later; and acting on this agreement, he brought on the site river sand and bricks worth K1,218.00 and, with the assistance of the defendants' maintenance unit, water was brought into the premises.

It was also his evidence, that since the partitioning of the hall required special expertise, he commissioned contractors by the name of G Martin, of Royal Construction Company. The work they did was worth K12,500.00, and were about to complete when, by a letter dated 11th November 1992, the agreement was abrogated by the defendants. The letter, which was written by Mr Ntonya, the Company Secretarty, and which is of some importance in these proceedings, stated:

"Your letter of 16th September 1992 refers.

I regret to have to advise that the accommodation you applied for your studios will now not be available to you due to certain developments within the Group of Companies. The expenses incurred by you for repairs, less labour which was ours, will be refunded upon production of authenticated invoices.

We regret for the inconvenience caused to you by this development but hope to do business with you in the future."

The plaintiff went on to say that when he got this information, he had no option, but to tell the contractors to stop partitioning the hall. The contractors then demanded their payment. The letter of demand stated:

> "With reference to your letter dated 3rd November 1992, regarding the above contract, please note that since the works have been fully carried out, I require the final payment of K12,500.00 within the next seven days. This is due to breach of contract which has arisen with your landlords. If by 17th of November you fail to pay us the full amount then we shall have to charge you damages on a daily basis. Failure to do this, the matter shall be put forward to our lawyers."

As a result of this letter, he paid the money; he is now claiming this money from the defendants.

Up to this point, there is not much dispute. In his evidence, Mr Ntonya confirmed that there was the agreement; that they would provide labour for the supply of water, and that they abrogated the agreement and agreed to pay the plaintiff what he had expended on bringing the water into the premises. He agreed that the necessary documents would be prepared in due course. However, there are one or two points that Mr Ntonya disputed. First of all, he said that during the discussions, there was no agreement as to the rent which the plaintiff was going to pay, although they allowed him to occupy the premises. Secondly, he said that there was no agreement that the plaintiff was going to engage a contractor to make the partitions, but that the plaintiff would buy the necessary materials and the defendants were to provide labour from their maintenance unit where they had adequate and qualified staff. Indeed, what Mr Ntonya told the Court is fortified by his letter to the plaintiff, dated 17th December 1992, in which he stated:

> "Our understanding was that you were going to use the BP & P maintenance crew to install water pipes etc. There was no mention of an outside contractor who, if he were engaged would have first been notified to us....
>
> There was no permission given nor an understanding taken that we would be responsible for the cost of hiring an outside contractor."

Perhaps I could dispose of this point at this juncture. It is my understanding that the plaintiff does not say there was an agreement or an understanding that the plaintiff would employ an outside contractor for the purposes of partitioning the building. All what the plaintiff is saying, and indeed, what can be discerned from the correspondence, is that since the defendants abrogated the agreement, he lost K12,500.00 which he had to pay the contractors to partition the hall. Indeed, in cross-examination, Mr Ntonya conceded that the costs which were incurred on the partitions were to be settled by the

plaintiff himself, and not by the defendants. All what the plaintiff is saying is that the K12,500.00 has been wasted because of breach of contract, and he would like to be reimbursed, in the form of damages, if the Court would find that the defendants were at fault or in breach of the agreement.

I will revert to the plaintiff's evidence. He went on to say that the defendants, through their legal practitioners, Sacranie Gow & Company, offered him a lease of the same premises for 12 months. He declined the offer. He went on to say that when he first accepted to go into the premises, the plaintiff was occupying premises belonging to Tobacco Processors at a rental of K955.00 per month. Since he was going to move out, he gave three months notice that he would be vacating the premises. Meanwhile, Tobacco Processors offered the premises to someone else; and when the defendants abrogated the agreement, the plaintiff found himself without premises for his business. Tobacco Processors came to his aid by offering him alternative accommodation at K1,645.00 per month. He had no option, but to take the accommodation. He is still occupying the same accommodation. He is, therefore, claiming the difference between the higher rent and the original lower rent.

It was Mr Ntonya's evidence that the question of rent was never discussed; neither did they agree that the plaintiff would employ a contractor.

DW2 and DW3 gave evidence to the effect that they were members of the maintenance crew employed by the defendants. Upon instructions from their supervisors, they did the plumbing work at the premises and they could, if asked, have made the partitions in the premises, since they had both qualified artisans as well as the equipment for doing so.

From this evidence, it is quite clear that there was an agreement between the parties - for the plaintiff to lease the building and for the defendants to let the building. It was as a result of that agreement that the plaintiff brought on the site the sand and bricks; it was because of that agreement that the plaintiff employed contractors to do the partitioning; it was as a result of that agreement that the plaintiff gave notice to Tobacco Processors that he would be moving out from the premises he was occupying; and it was as a result of that agreement that the defendants provided the maintenance crew to do the plumbing works. The only dispute as to the agreement is raised by the defendants, and that is that the amount of rental was not agreed upon, as well as the hiring of the contractor to do the partitioning. Mr Ntonya agreed, however, that the defendants did, of course, repudiate the agreement.

It has been submitted by Miss Zimba, Counsel for the defendants, that the issues which are to be decided are: (i) whether there was a binding agreement between the parties; and (ii) if there was a binding agreement, it was a term of agreement, if (a) the plaintiff was to use the defendants' maintenance crew and (b) whether there was a term that the rental was to be K500.00 per month. She has submitted that there was no binding contract, because there was no offer and acceptance. It will be noted that there was a verbal offer to the plaintiff to lease the premises. After discussions, the plaintiff wrote, **inter alia**, "This is to confirm, that we are indeed interested and we are looking forward to occupy the offices as soon as we sign the necessary documents with you." She cited to me the cases of **Winn -v- Bull (1877) 7 Ch.29** and **Hussey -v- Horne Payne (1879) 4 AC 311.**

It is well-settled that a conditional acceptance of an offer does not constitute an acceptance in the legal sense. Indeed, in everyday life, it is very often that some agreement would be signed "subject to contract" or "subject to formal contract to be prepared by our solicitors". These phrases do not constitute acceptance and, as **Cheshire & Fifoot's Law of Contract** says, "Until the completion of the formal contract both parties enjoy a **locus poenitentiae.**" It would appear to me that at that stage there was no binding contract. But as it was pointed out in the case of **Hussey -v- Horne Payne**, the Court has to look at all the circumstances of the case in order to infer whether there is or there is no contract. In this case, the letter says, "as soon as we sign the necessary documents with you." On the evidence before me, no documents were signed by the parties; but it is the duty of the Court to find out the intention of the parties from the correspondence as well as from the surrounding circumstances whether there is a contract or not. In the present case, after this letter of the 16th September 1992, the plaintiff brought sand and bricks on the site; he also brought plumbing materials and the defendants' maintenance crew installed the plumbing system and brought water into the premises.

Taking all these factors into account, I am of the opinion that there was a binding contract. I am fortified in my conclusion by the fact that even Mr Ntonya agreed that there was an agreement which the defendants repudiated. This action must, therefore, succeed.

It has been submitted by Miss Zimba, that if I find that there was a binding agreement, as I have found, the plaintiff is not entitled to the sum of K12,500.00 which he expended on partitioning the premises and he is not entitled to the difference of the rentals he paid to Tobacco Processors before and after he had given notice to vacate.

She has submitted that there was no agreement as to these. In any case, there were no terms of the agreement. As to the K12,500.00, it had been admitted by Mr Ntonya that the responsibility of partitioning the premises fell upon the plaintiff. As far as the rentals are concerned, it has been established that before the plaintiff gave notice to vacate the premises he was occupying, he was paying K955.00 per month for rent. When the agreement fell through, he could not go back to the same premises because Tobacco Processors had already offered the premises to somebody else and the alternative accommodation they offered the plaintiff was at K1,645.00 per month. Had the defendants not broken the contract, he would have been in the same premises, paying rent of only K955.00 per month. The plaintiff is entitled to the difference.

The general rule is that a breach of contract always entitles the innocent party to maintain an action for damages. Similarly, the plaintiff in this case is an innocent party. I, therefore, award the following damages:

(1)	Money expended on sand, bricks, pipes and wash basin (which the defendants have agreed)	=	K1,818.00
(2)	Money paid to contractors	=	K12,500.00
(3)	Difference of rentals at K690.00 per month for two months	=	K1,380.00
	Total		**K15,698.00**

I, therefore, award him the sum of K15,698.00 and costs for this action.

PRONOUNCED in open Court this 11th day of May 1994, at Blantyre.

H M Mtegha
JUDGE