IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 1278 OF 1998

BETWEEN**:**

MISS J. P. KAPELEMERA ..... PLAINTIFF

- and -

DUWE MOTORS ..... DEFENDANT

CORAM: TEMBO, J.

Masiku, of Counsel for the Plaintiff

Chirwa, of Counsel for the Defendant

Selemani, Court Clerk

JUDGMENT

TEMBO, J.: This is an action of the plaintiff by which she is claiming damages for breach of contract. The plaintiff avers the following in her statement of claim: A contract was made between the parties on 20th December, 1996, pursuant to which the defendant sold to the plaintiff a Daihatsu Charade, Registration No. BG 9257 (hereinafter to be referred to as the "motor vehicle") at the price of **K40,000.00**. That, then, the plaintiff had expressly or by implication made known to the defendant the purpose for which she required the motor vehicle. Thus, that she needed it for transport and personal enjoyment. In that regard, the plaintiff avers that it was an implied condition of the contract and that the defendant had thereby warranted that the vehicle sold and then delivered by the defendant to the plaintiff was reasonably fit for the expressed purpose. In breach of such condition or warranty, it is asserted, the motor vehicle delivered to the plaintiff by the defendant was not reasonably fit for the expressed purpose. Consequently, the plaintiff was compelled to return it to the defendant on 31st December,

1996. Hence the instant action, in which the plaintiff is claiming repayment to her of the sum of **K40,000.00** being failed consideration; interest on such amount to be computed effective from 31st December, 1996, to the date of payment at a rate to be assessed by the Court; and the plaintiff is claiming damages for breach of contract and indeed for costs of the instant action.

On its part, the defendant denies any liability therefor. In particular, the defendant avers that it is a dealer in second hand motor vehicles and that this factor was known to the plaintiff before the purchase. Besides, the defendant avers that it gave no warranty as to the condition of the motor vehicle, as evidenced by a cash sale No 138 dated July 20, 1996. Further, the defendant has made a counterclaim for storage and security costs at K500 per day effective from 31st December, 1996 until the motor vehicle shall be collected by the plaintiff. In the circumstances, the defendant prays for the dismissal of the plaintiff's claim with costs; and indeed damages by way of its counterclaim.

The Court has heard four witnesses, two for either side. The facts to be gleaned from the testimonies of the witnesses are not in dispute. To begin with it is expedient for the Court to point out, that the testimonies of the plaintiff, PW1, and that of Mr. Mkwinda, DW2, are particularly relevant. Mr. Mkwinda was defendant's salesman at the time. In that respect, the plaintiff and Mr. Mkwinda were the only persons who had personally and orally engaged in the negotiations for the conclusion of the contract to which the issues raised in the instant case relate.

Now, taking into account the testimonies of all the witnesses, and in particular those of PW1 and DW2, the facts in the case are as follows: The plaintiff on or about 20th December, 1996 was an employee of Air Malawi Ltd. By the conditions of employment, as such employee, the plaintiff was entitled to the purchase of a motor vehicle for her personal use and for transport to and from the office at Air Malawi Ltd through a motor vehicle loan scheme. She, therefore, approached the defendant for that purpose. A Toyota Collora was identified as a suitable motor vehicle for her. An oral agreement was reached that the defendant sells the Toyota Collora to the plaintiff, after valuation at the Road Traffic Commissioner's Officer, at the price of **K60,000**. Consequently, the plaintiff obtained from her employer a loan amount of **K53,000** for the purpose. When the cheque was ready, Mr. Mkwinda called at the plaintiff's place of work to collect it. It was the arrangement of the parties that the shortfall, of **K7,000** on the full price of the Toyota Collora, would be paid otherwise than as part of a loan amount procured by the plaintiff from her employer. Mr. Mkwinda had collected the cheque in the amount of **K53,000**, in respect of the plaintiff's intended purchase of the Toyota, in the morning of 20th December, 1996. When he got back to his office, with that amount, Mr. Mkwinda informed the plaintiff by phone that the Toyota was no longer available for the plaintiff. Reasons given, for that development, was that the defendant does not own the vehicles put out for sale, but that the defendant sells them on behalf of owners and for a commission. And in respect of the Toyota, the owner had in fact withdrawn it from sale

to the plaintiff when it transpired that the plaintiff was taking too long to raise and therefore pay the agreed price therefor.

It is expedient for the Court to note that the futile transaction, in regard to the Toyota, was by way of an oral contract between the plaintiff and the defendant. On behalf of the defendant, Mr. Mkwinda was its salesman.

Noting that development, and realising that in the circumstances the defendant would be under obligation to return to the plaintiff the cheque for the amount of **K53,000**, Mr. Mkwinda on behalf of the defendant offered the motor vehicle, under consideration, to the plaintiff. Indeed the plaintiff had maintained the purpose for which she would seek to buy a motor vehicle from the defendant. Mr. Mkwinda assured the plaintiff that the motor vehicle was as good as, if not better than, the Toyota the plaintiff originally sought to buy from the defendant. On her part the plaintiff was cautious; she wanted the motor vehicle to be examined by her own motor vehicle mechanic, prior to the making of her mind to accept to buy it. So, she inquired of Mr. Mkwinda if the motor vehicle would be available for immediate examination by her motor vehicle mechanic. To that inquiry, Mr. Mkwinda's response was in the negative. He assured the plaintiff of the fact that there was no need for such an examination, the motor vehicle, in the expressed view of Mr. Mkwinda being in good condition for the purpose of the plaintiff. In that respect, and by his representation as to the condition of the motor vehicle, Mr. Mkwinda won the heart of the plaintiff for the motor vehicle in question. The plaintiff had a ride in the motor vehicle and she agreed to buy it at the price of **K40,000**. It is once again expedient to note that by then the purchase price of **K40,000** was already in the possession of the defendant and that the contract had been sealed, so to speak. The defendant therefore were by then under a duty to deliver the motor vehicle to complete the transaction in question. That moment came, on 20th December, 1996, when Mr. Mkwinda drove and, therefore, brought the motor vehicle to the plaintiff at her work place in Blantyre. Upon delivery of the motor vehicle, Mr. Mkwinda produced a delivery note of the defendant for the signature of both the plaintiff and Mr. Mkwinda for the defendant. In fact the plaintiff expressly told the Court that Mr. Mkwinda told her that this was a delivery note, for the plaintiff to sign, for among other things to show the price of the motor vehicle which was **K40,000**. She did sign it without much ado and she put it away as a delivery note. She got a refund of K13,000 from the defendant, the cheque delivered for the Toyota then, being for **K53,000**.

The motor vehicle was used for a period of, to say the least, a week and it proved beyond any doubt that it was not reasonably fit for the purpose for which the plaintiff had bought it. It perpetually was broken down and, therefore, incapable of rendering the service sought of a motor vehicle. Thus it could not move when required, by the plaintiff, to do so. The defendant was approached and attempts to put the vehicle in order were to no avail, until on 31st December, 1996, thus, after exactly 10 days of the date of delivery, the plaintiff returned it to the defendant and sought to be paid her money back. Hence, the

position of the parties in Court now. Since that date, 31 December, 1996, to date, the motor vehicle has been at the defendant's premises.

On its part, in determining the instant case, the Court must consider and determine the following issues: Was there any contract between the parties and what were its terms? Was it oral or written or was it partly oral and partly written? If so, or otherwise, was the delivery note issued by the defendant to the plaintiff upon the delivery of the motor vehicle part of the contract of sale in question?

To begin with, it is not in dispute that there was a contract between the parties for the sale of the motor vehicle. In the well considered view of the Court, that transaction was by way of an oral contract only. The parties had agreed orally and consequent thereupon the defendant delivered the motor vehicle to the plaintiff. The delivery note, in the view of the Court, came too late in the day to form part of the contract in question. It was indeed a mere delivery note and the Court holds a firm view that the plaintiff was quite justified to merely treat it as such. The parties had been involved in this type of business transaction twice within a short period of time. In the first instance there was an oral contract in respect of the intended sale of a Toyota and finally the oral contract to which this case relates.

As to the terms, express or implied, of the oral contract, the Court is of the firm view, given the evidence, that the defendant, through Mr. Mkwinda had made a representation and, therefore, a warranty as to the fitness of the motor vehicle. In that regard, it is interesting to note that in his testimony Mr. Mkwinda expressly told the Court that he had to persuade the plaintiff to buy the motor vehicle in question. Besides in rejecting the request of the plaintiff to have the motor vehicle examined by her motor vehicle mechanic, Mr. Mkwinda, expressly vouched the fitness and indeed road worthiness of the motor vehicle, in such a manner or to the extent that the plaintiff saw no need for her to insist on her request. The results, in the performance of the motor vehicle, upon delivery do not show that the motor vehicle was reasonably fit for the expressed purpose. To that extent, the Court would find the defendant to be in breach of the contract.

The defendant pleads, in defence, that there was an exclusionary clause by which the defendant excluded its liability in that regard. In that respect, the defendant relies on the delivery note which among other things contained the following:

"No guarantee on second hand vehicle.".

In that regard, as a matter of fact the Court has already made a finding that that document did not form part of the oral contract which by then had long been reached and finalised. This, to put it clearly and simply, was a mere delivery note and that the plaintiff was

reasonably entitled to have merely treated it as such. The law on the point is quite clear. The Court is content merely to cite the case in which Mtegha, J, as he then was, had made a thorough review of case authorities in that regard: **Karim & Sons -v- AMI Rennie Press**, 12 MLR 91, at 96, 101:

"It appears right from the outset that the Court must be satisfied that the particular document which contains notice of the excluding term or limitation term is an integral part of the contract. If is so construed, it must be signed. If it is not signed, the question which has to be determined is whether reasonable notice had been given to the party against whom the clause applies. Normally, the notice has to be given before or at the time the contract is being negotiated or concluded. If none of this arise, then the Court may consider previous dealings between the parties...

Yet in **Hollier -v- Rambler Motor (A.M.C.) Ltd (4)**, the Court of Appeal came to a different conclusion. The plaintiff had had his car repaired at the defendant's garage on three or four occasions over a period of five years. He had signed a form on at least two occasions and that form contained an exclusion clause stating:

'The company is not responsible for damage caused by fire to customer's cars on the premises.'

The plaintiff's car was damaged by fire due to the negligence of the defendant 's servants. The plaintiff sued for the value of the car. It was held by the Court of Appeal that the defendant was liable because there was no sufficient, course of dealings between the parties and therefore the exemption could not be incorporated into an oral contract.".

As noted above, in the instant case, the delivery note cannot be part of the contract as it was merely intended to be a receipt for the sale of the motor vehicle, as it came long after the oral contract was concluded and executed. The only way it possibly could have been incorporated would have been if there were previous dealings between the parties, to justify such incorporation. In the instant case, there were none. As a matter of fact the futile sale of the Toyota Collora was to have been effected by way on an oral contract. No document was signed at all. So, in a way, that only confirms the view that the delivery note was merely to be treated as such at the very end of the transaction. Had the Toyota been delivered, a delivery note would have been issued likewise. In the circumstances the defendant's prayer or submission in that regard must fail and it is rejected accordingly.

In the circumstances the plaintiff's claim succeeds accordingly.

Respecting the counterclaim of the defendant, the position is that there is no evidence really to support it. In returning the motor vehicle the plaintiff did not act in breach of the contract. Rather, the defendants were and hence her action. The counterclaim must fail without more. It is dismissed accordingly.

The plaintiff's claim succeeds in its entirety. As for the rate of interest to be charged and damages payable, the parties must appear before the Registrar on a date to be appointed by the Registrar.

Costs are for the plaintiff.

MADE in Open Court this 21st day of February, 2003 at Blantyre.

A. K. Tembo

JUDGE