

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO 1660 OF 1995**

BETWEEN:

TARIQ BHAMAN (male).....PLAINTIFF

- and -

THE ATTORNEY GENERAL.....DEFENDANT

CORAM: CHIMASULA PHIRI J.

Mwala, of Counsel for the applicant

Absent, Counsel for the Attorney General

Mdala, Court Clerk.

JUDGMENT

Chimasula Phiri J.

The plaintiff claims the sum of K703,705.00 as loss of income which he would have earned had Blantyre City Fuelwood Project (under Ministry of Forestry and Natural Resources) not breached agreement.

This matter was partly heard by Justice Ndovi on 15th July 1998 when the plaintiff started giving his evidence. At that time no advocate from the Attorney General's Chambers appeared. I took over the matter and set it down for hearing on 12th January 2004. The plaintiff sent notice by post on 17th December 2003. The notice was also sent by fax. On 12th January 2004 the matter was adjourned to 23rd February 2004. The defendant had also failed to attend. I specifically directed the plaintiff to take out notice of adjournment by 16th January 2004 so that the Attorney General could be given ample

time to prepare for the case. There is affidavit of service showing that the notice was sent to the Attorney General by post on 13th January 2004. There was no appearance by the defendant on the scheduled date. The court adjourned the matter to 10th March 2004 and ordered personal service of the notice of adjournment. Service was effected on Mr Pacharo Kayira on 1st March 2004. No one appeared from the Attorney General's Chambers on 10th March 2004. In terms of Order 35 Rule 2 of the Rules of the Supreme Court, I proceeded to hear the evidence of the plaintiff and his witness. I bear in mind that the plaintiff shoulders the burden to prove his claim on a balance of probabilities. The proof will be limited to the allegations in the Statement of Claim. **See Barker v Furlong [1891] 2 Ch at 179.** The plaintiff having proved his case is entitled to such relief as he claims and such other relief as is consistent therewith – **Stone v Smith (1887) 35 Ch.D 188.**

PLEADINGS

The Statement of Claim sets out the plaintiff's pleadings as follows:-

1. The plaintiff owned a bluegum plantation at Nkhalamo in Chikwawa district.
2. Between 1989 and 1991 Blantyre City Fuelwood Project, with the agreement of the plaintiff, took over the plantation on condition that it would raise an alternative plantation for him.
3. Blantyre City Fuelwood Project failed to raise an alternative plantation, has paid no compensation to the plaintiff, and the plaintiff has suffered loss and damage.

PARTICULARS

1. Original trees

- | | | |
|-----|---|--------------------|
| (a) | 25,000 trees valued at K7.00 each..... | K175,000. |
| (b) | Bonus for 3 years at K1,250 per year..... | K3,750.00 |
| | | ----- |
| (c) | Sub-total..... | K178,750.00 |
| | | ===== |

2. Coppices after Felling Original Trees

(d) 3 coppices per stump for 25,000 trees at
K7.00 each.....K525,000.00

(e) **Grand total.....K703,750.00**

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4. The plaintiff, therefore claims the said sum of K703,750.00 plus costs of this action.

The defence served by the Attorney General is set out as follows:-

1. The defendant denies having agreed to raise an alternative plantation for the plaintiff and puts the plaintiff to strict proof thereof.

2. The defendant denies being in breach of any building agreement with the plaintiff.

3. The defendant denies having caused any loss to the plaintiff as particularised under paragraph 3 of the Statement of Claim and puts the plaintiff to strict proof thereof.

4. Save as hereinbefore expressly admitted the defendant denies each and every allegation of fact made in the plaintiff's Statement of Claim as if each was set out and traversed seriatim.

5. **WHEREFORE** the defendant prays that the plaintiff's Statement of Claim be dismissed with costs.

ISSUES

The pleadings have basically raised 3 issues namely, whether or not an agreement was made between the plaintiff and Blantyre City Fuelwood Project. Secondly, if there was such an agreement, whether or not the defendant breached that agreement. Thirdly, if there was breach of that agreement by the defendant, what loss or damage has the plaintiff suffered?

EVIDENCE

The 1st witness was the plaintiff. He told the court that he raised a 25,000 blue gum tree plantation at Nkhalamo in Chikwawa district. He was requested by the Blantyre City Fuelwood to surrender his plantation to them and that in consideration thereof they would plant an equivalent number of trees for him. He stated that the agreement was witnessed by, among others, the District Commissioner for Chikwawa, Chief Lundu, Chief Kasisi and a forestry official from Chikwawa. He further stated that he found a place at Pende in Chikwawa and he informed the Project management accordingly. They refused and advised him to find another land because there were a lot of natural trees on the land he had identified. Eventually, land was found near Nkhalamo. The Blantyre City Fuelwood Project planted 25,000 on the land in 1989 but they never exercised care and the trees died. In 1990 they planted again but none of the trees survived for want of care. Since then the Project never made anymore attempts to raise a plantation for him and have not compensated him. The plaintiff stated that he has suffered loss and damage because he would have been selling poles from the plantation after 3 years on maturity of the trees. He informed the court that in 1989 and 1992 the price of one tree ready for sale was K7.00. In 1995 the price had risen to K10.00 and in 1998 the price was K30.00 and finally in 2001 the price was K50.00 per tree. He tendered cash sale receipts for his other plantation in Chiradzulu as evidence to prove the prevailing market prices for such trees.

It was his further evidence that when a bluegum tree is cut, the stump produces coppices and usually these could be many. The coppices grow into big trees and it is up to an individual farmer to decide how many he/she would like to retain per stump. The plaintiff says he leaves 3 coppices per stump. He tendered in evidence a letter from the District Forestry Office, Chikwawa which stated as follows:

The recommended shoots to grow on a stool (stump) should be done in two stages, the first to 3 or 2 shoots when the height of the shoots is between 3 and 4 metres and the second, to 2 or 1 short per stool when the dominant is 7 to 8 metres. Reductions should be made to either 2 or 1 short per stool, depending on the produce requirement".

The plaintiff explained that from the 25,000 trees he had planted he would have harvested 25,000 trees in 1989. Thereafter in 1992, 1995, 1998 and 2001 he would have been harvesting 75,000 trees during harvesting season. He further informed the court that in the year 1986 – 88 Government introduced a bonus scheme of 5 tambala per surviving tree. The plaintiff contends that he could have earned such a bonus on his 25,000 trees in 1989. There is a letter from the District Forestry Officer, Chikwawa dated 17th July 1998 confirming existence of the bonus scheme until 1991 when it stopped due to lack of funds. Finally, the plaintiff says he is a commercial farmer and as such he would have been investing his money to earn interest. He is claiming interest.

The 2nd witness was Mofolo James. He informed the court that from 1988 he was working for Mr Bhamani as a foreman at Nkhalamo plantation in Chikwawa. He said the plaintiff was approached by the Regional Forestry Officer, the District Forestry Officer and Blantyre City Fuelwood Project who requested that the plaintiff should surrender his Nkhalamo tree plantation to the Blantyre City Fuelwood Project and that the latter would raise another plantation for him. He stated that the plaintiff agreed and this agreement was made in the presence of the District Commissioner for Chikwawa, Chief Lundu and Chief Kasisi. He stated that Blantyre City Fuelwood Project had agreed to raise another plantation for the plaintiff around Pende area in Chikwawa. He also stated that in Nkhalamo plantation the plaintiff had planted 27,000 trees but only 25,000 trees survived. He adopted his witness statement. The plaintiff also submitted a witness statement of the Acting District Forestry Officer, Chikwawa. However, the witness failed to come on 10th March, 2004 due to other engagement. He had previously attended court. The plaintiff closed his case at the end of the evidence from the 2 witnesses. I have no reason to doubt the testimony of these 2 witnesses.

THE LAW AND FINDINGS OF FACT

The general rule in contract is that a party to a contract must perform exactly what he/she undertook to do in the execution of the contract. It is unchallenged evidence that the plaintiff entered into a contract with Blantyre City Fuelwood Project whereby the Project took over the plaintiff's plantation and in consideration thereof it was going to raise another plantation for him. The Project did not successfully raise such a plantation i.e it did not perform its part of the contract. I find as a fact that the Project breached the contract.

The Attorney General is vicariously liable for that breach of contract. The plaintiff has suffered loss and damage as a result of that breach of contract. He is entitled to damages. Damages are a compensation to the plaintiff for the damage, loss and injury he has suffered through that breach of contract. The court has to assess in monetary terms and place the plaintiff in the same position as if the contract had been performed – see **Robinson v Harrman** (1848) 1 Exch 850. It is the unchallenged evidence of the plaintiff that he would have harvested 25,000 trees in 1989 followed by 75,000 trees in 1992, 1995 1998 and 2001.

Evidence has shown that the prices of the trees were K7.00 in 1989 and 1992; K10.00 per tree in 1995; K30.00 per tree in 1998 and K50.00 per tree in 2001. These prices do not appear high to me and are acceptable. However, I am bound by the pleadings. The plaintiff did not amend the pleadings to incorporate the loss suffered by the plaintiff after 1992. Therefore the only award I make for the plaintiff against the defendant is as follows:-

- (i) K175,000.00 for 25,000 trees lost in 1989 harvest.
- (ii) K525,000.00 for 75,000 coppices lost in 1992 harvest.
- (iii) K3,750.00 for lost bonus for 1989, 1990 and 1991.

The total award is K703,750.00. Obviously if the plaintiff had amended his statement to incorporate the losses for 1995, 1998 and 2001 he should have been easily awarded those sums. I decline to do so because these were not pleaded nor was there any prayer for their inclusion during the hearing despite evidence thereon being adduced. Similarly, I decline to order interest because this was not pleaded.

CONCLUSION

The plaintiff succeeds in his claim for K703,705.00 with costs.

PRONOUNCED In Open Court on the 14th day of April, 2004 at Blantyre.

Chimasula Phiri
JUDGE