IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL APPEAL NO. 31 OF 2006

BETWEEN

J.M. KAPELEMERA …….. 1ST APPELLANT
F. WHAYO …….. 2ND APPELLANT

AND

CHIDZIWENI BANDA …… RESPONDENT

CORAM : CHOMBO, J.

: 1st Appellant – unrepresented – Absent
: 2nd Appellant – unrepresented – Present
: Respondent – unrepresented – Present
: Kabaghe, Court Reporter
: Njirayafa, Court Interpreter

JUDGMENT

The 2nd appellant informed the Court that his colleague the 1st appellant was sick and unable to report to Court. However, he asked Court to proceed in the absence of the 1st appellant.

The appeal arises out of dissatisfaction with the order of the lower court that the 1st appellant should pay K16,865.00 and 2nd appellant K14,640.00 by instalments of K5,000.00 effective 30 March 2006, to satisfy an outstanding debt with the respondent.

In their grounds of appeal the appellants state that:

1. since the Court ruled that the respondent should be compensated for transport money, accommodation and food for the times that he travelled

to Dedza to collect his money that they had borrowed who would compensate them for the time they took from work to attend court proceedings.

2. that the Court had demanded for receipts of the expenses of Mr. Banda but there were never brought yet the Court believed that he spent the sums of monies that he had claimed but did not believe their evidence, documentary evidence about the sums of money still owing to the respondent.

3. that there was "cutex" used on the summons to 1st appellant to alter the sum of money in dispute resulting in the same summons having two different sums of money being claimed.

4. that the respondent did not produce his business license for doing katapila.

5. the appellants queried why the Court had decided to divide in two the money that the respondent was claiming, when they had already paid the monies that they had borrowed from the respondent in January and not March 2005; and how could the respondent loan them money when he was dismissed from work.

6. the appellants query why the court, upon finding then liable did not give them an opportunity to state how much they would be able to pay rather than imposing punitive installments.

The appellant's grounds of appeal are in English, but without looking down upon the appellants, it would have served the court better if these had been in Chichewa a language that they are more comfortable with; and this is acceptable by courts. The court tried as best as it could to extrapolate the grounds of appeal from what the appellants had put down in English.

In response, the respondent stated that he had told the court and the appellants that he could not produce receipts for his travels because he uses bicycle and matola from Mitundu to Dedza so he does not have receipts. The respondent submitted that he spent a lot of money coming to Dedza to collect his money and yet each time he travelled it was with the sanction of the appellants. Only after arriving in Dedza he would be told that there was no money for him. After a number of fruitless trips to Dedza he told the appellants that he was going to sue them for the transport money. In May 2005 the 2nd appellant paid K3,500.00 through the respondent's witness, PW2, but he did not accept the money because the respondent had instructed him to receive the full amount or nothing. In June and July the respondent went to see the appellants for the money but he came back with empty hands after the two failed to pay him as earlier promised. In August and September the respondent again made fruitless trips to Dedza in an attempt to collect his money. He was given K1,000.00 as refund for transport and told that the full sums would be paid in October 2005. When he came in October, however he was only given K3,500 as refund for expenses. Each trip to Dedza in a bid to collect his money took up to 2 weeks and all that time he was in rest houses and incurred expenses in food and accommodation. PW2, Mr. Chisale, had evidence that did not differ from that of the respondent, then the complainant in the lower court.

The two appellants did not dispute the evidence of the respondent and his witness in the lower court and they actually confirmed that the respondent did make the trips in question. They did also admit that before making each trip the

respondent would phone to find out if the money was ready. Upon assurance from the two appellants the respondent would travel only to be told whilst already in Dedza that there was no money. The appellants also knew that they knew that the respondent used to travel from Lilongwe in all the trips that he was making.

In their appeal the appellants are asking who will compensate them for the times that they came to Court. The appellants have not, apart from asking that question, stated what losses they incurred as a result of attending court. But, even if they had stated the losses it would be difficult, for the Court to answer that question. It should be understood that they, after they failed to repay the money as promised, and kept telling the respondent to come to Dedza to collect his money, and fail to pay him each time he came, makes them liable for those expenses that the respondent suffered. If they had paid the money, or told the respondent not to come to Dedza until the money was ready, they would not have been responsible for those fruitless trips. The fact that they lost time from work has nothing to do with the respondent because they are the ones that were at fault. If they had paid the money as promised it would not have been necessary for the respondent to go to court and sue them.

The appellants are questioning the court's decision to believe the respondent in the absence of receipts when the same court does not want to believe them about when they took the money and when payments were made. The evidence on record, in my view, should play a big role to inform the appellants why the lower court arrived at the particular determination that it made. The appellants

admitted taking the money from the respondents at an interest of 30% and that the money was to be paid in full by 31 March 2005. After the respondent gave his evidence in the lower court the appellants did not question the respondent and his witness on the evidence that he had given, save a few questions about the exact amount of money taken from the respondent and where this money exchanged hands. This then leaves almost all the evidence of the respondent, then the complainant, and PW2 undisputed and thus the court believed the evidence of the complainant and his witness.

The appellants further submit that it would seem that the intention of the court is to punish them by not asking them whether they can manage to pay K5,000.00 per month; instead the Court just imposed the mode of payment on them. The appellants had a right to tell Court how much they could manage per month paying back on the debt. On appeal then that should have been one of the points that they raised. When Mr Whayo, the 2nd appellant was asked if there was anything additional that he wanted to state to Court in addition to the written grounds of appeal he said that there was nothing. The Court can not therefore be blamed for not giving the appellant an opportunity to state what he calls "mitigation"

The appellants also questioned how it was possible that the respondent could have loaned them money when he was actually dismissed. Well, the Court may not be in a position to state how this happened, but there is evidence to the effect that the respondent was employed, no doubt getting money from his employment, and he had a timber business as well. It is not known whether the

money came from his employment or the timber business, suffice to say that the appellants on their own volition borrowed money from the respondent. Did the respondent have a business license for his "katapila" business? That has not been established, nor did the appellants question that or demand for the license before getting the money from the respondent. They should have found out that at the point of getting the money, if it was that important to them. But, they can not now turn around and say they can not pay back the money because the respondent did not or does not have a "katapila" license. When they went to get the money the respondent laid down his terms – that there would be interest at 30% and the appellants agreed with the terms, and got the money, so they became bound. They must therefore pay back the money according to the terms that they agreed upon.

At the end of the day, the Court must determine what monies the appellants still owe the respondent and how the same is to be paid. The question to determine is whether the money was paid, either in full or in part as claimed by the appellants, or not paid as submitted by the respondent.

According to the evidence on record, the 1st appellant got K10,000 from the respondent and was to pay back K13,000 after 30% interest. The 2nd appellant got K12,000 and was to pay back K15,000 at the end of the second month. According to the two appellant they got the money in January 2005 and not March 2005 and they were supposed to pay back the full sums in February 2005. The 1st appellant testified that he made several payments totaling to K9,000 leaving a balance, according to him of K1,000. The 1st appellant does not state what happened to

the agreement to pay K13,000. According to the terms of the agreement, the 1st appellant still owes the respondent K4,000.

The 2nd appellant in his evidence, testified that he paid K2,000 in February, then K4,000 in April then K500 in May then another K4,000 in October and K3,000 in November and K2,000 in December, and, according to the 2nd appellant, leaving a balance of K2,180. If indeed these figures are correct, as the 2nd appellant stated in his evidence that he was supposed to pay back K15,000 but when these figures are added up they come to K17,680. If the 2nd appellant still has a balance of K2,180 to pay, how does he account for the difference in the final sum to be paid. Should it be assumed that he did not pay the sums of money as enumerated to Court? He states that there is still a balance of K2,180, and I will accept his evidence as to the unpaid balance.

The two appellants admitted that the respondent used to travel from Lilongwe, Mitundu to Dedza to ask for his money and this money was never paid back. The lower court calculated the sums of money involved and divided the total sum in two so that each appellant should bear some responsibility. This was justifiable because every time the respondent travelled to Dedza it was with the sanction of the two appellants. The evidence on record is that each trip used to cost K940 and there were 10 trips. The respondent testified that he used to travel by bicycle and matola where no receipts are issued. The total in transport cost was therefore K9,400. The respondent showed, but no receipts were submitted that he used to put up in rest houses and incurred food expenses. It was his submission that at one time he stayed for up to two weeks waiting for his money.

There was however no breakdown of the actual costs of the room, food etc and it would be difficult to accept the respondent's evidence that he used to spend the sum of K2,500. The Court will exercise discretion to award the respondent some refund on the accommodation and food expenses but not in full. This was more than 3 years ago and there is no way of finding out what the costs are presently. I would say that a sum of K600 per trip would be reasonable. The respondent must therefore be refunded the sum of K6,000. The total in refunds for the respondent for transport and accommodation is K15,400. As noted by the lower court this sum of money represents the costs that the respondent incurred to travel to Dedza to collect the money from the two appellants. This is why the lower court divided the costs in two so that each appellant takes responsibility. The sum of K15,400 divided by two therefore gives us K7,700 each. In addition, the 1st appellant stated that he had only paid K9,000 – leaving a balance of K4,000. This means that the 1st appellant will pay the K7,700 plus the K4,000 as balance. This gives the total as K11,700. As for the 2nd appellant it will be K7,700 and the balance of K2,180 making a total of K9,880.

Ordinarily interest on the unpaid balances would have been allowed. However, it is in evidence that the respondent had agreed to waive interest on the said sums of money after the first month of the two appellants failing to pay the full sum. It is therefore ordered that the said sums of money will be without interest. However, since the balances on the principle sum of money and the transport costs have been outstanding for a long time it is ordered that the sums of K11,700 and K9,880 be paid as follows with effect from 31st May 2008:

K1,950 per month for 6 months (up to 30th November 2008) for the 1st appellant and for the second appellant, with effect from 31st May 2008:
K1,647.00 per month for 6 months (up to 30th November 2008.

As three years has already elapsed from the time that the appellants should have paid off the sums of money owing, and after the respondent had told them he would sue them for his transport and accommodation costs, I order that the said sums be paid as calculated. In the event of failure to do so, on the application of the respondent, the court will impose interest on whatever balance will be outstanding at the date of default to pay.

It must be understood that the duty of the court is to interpret the agreement between the parties and see the best way of achieving justice.

MADE in Court this 19th June 2008.

E.J. Chombo
J U D G E