



**JUDICIARY**

**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NUMBER 975 OF 2006**

**BETWEEN:**

**MALAWI SAVINGS BANK .....PLAINTIFF**

**- AND -**

**PETER MHONE (t/a Consolidate Building  
Contractors) .....DEFENDANT**

**CORAM: THE HONOURABLE JUSTICE E. B. TWEA**  
Mr P. D. Saukira, of the Counsel for the plaintiff  
Absent, of the Counsel for the defendant  
Mrs Nkhoma – Official Interpreter  
Mrs Phombeya

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**RULING**

**Twea, J**

This is an application for continuation of an injunction obtained ex parte by the defendant, now applicant, on 7<sup>th</sup> September, 2007.

The facts of the case are not disputed.

It is deponed that the plaintiff, a Commercial Bank, granted an overdraft facility to the defendant, who is a building contractor. The overdraft facility

was overdrawn to the tune of K40, 859,969.00 and that the defendant paid in K37, 177,486.00 leaving a balance of K3, 742, 483.00 by 1<sup>st</sup> January, 2005.

The relationship between the parties continued. However, the defendant did not honour the repayments on the overdraft.

Sometimes in 2005, at a date which cannot be ascertained, the parties purported to have the overdraft converted into a secured loan. They created a charge over the property of the applicant. On 6 April, 2006 the plaintiff filed a suit for the recovery of the debt then standing at K8, 843, 503.29. Although there was acknowledgment of service, on 21.4.06, there seems to have been no defence or intention to defend filed by the defendant.

On March, 15, 2007 the plaintiff registered the charges that were purported to have been created in 2005. The two charges involved two properties of the defendant situate at Manja for loan value for KK9, 000.00 and at Namiyango for loan value of K1, 000.00. Both are in Blantyre. It was provided in both charges that the loans were to be repaid in twelve (12) equal instalments, at an interest rate of 4% above bank rate per annum, then at 28%. The ruling rate therefore, was 32%.

Sometime in or about September, 2007, the plaintiff sought to release the loan debt by way of sale of the defendants' two properties. The defendant obtained an injunction. This is the injunction the defendant now seeks to continue and the plaintiff is opposing.

It is not my duty to decide the rights of the parties. My duty is to decide whether or not the injunction should be continued. In my view this injunction must be continued.

This is a case of laxity in business dealings by the bank. Clearly, banks are entitled to work on trust with their clients. In the present case, it is clear that the plaintiff and defendants had a very healthy working relationship until the defendant started defaulting on re payment or serving the overdraft. The plaintiff however, only decided to protect its interest in 2005, by creating charges over the defendant's properties.

Be this as it may, these were not regularised until March 2007. The charges however, created a new obligations, that is, to pay the loan debt by instalments including the interest. This was to be re paid in 12 months.

It is clear that all these agreements were made after this case was already in court. Both parties acknowledged the debt and agreed to have it repaid in instalments. This mutual agreement therefore estops the plaintiff from enforcing the repayment by way of action, save for instalments in arrears plus interest until the 12 months expires. In this respect, it expires on 15<sup>th</sup> March, 2008. In the same vein, the agreement estops the defendant from denying that he owes the plaintiff this money. As to the status of the debt in respect of the instalments in arrears and the interest due, the parties can make the account for that. It need not be done by the court: See *New Building Society Vs Chimwaza Civ. Cause* 3067 of 2001.

It is therefore irregular for the plaintiff to seek to enforce repayment outside the charge and terms of agreement therein. None of the parties is entitled to rely on issues and disputes that occurred prior to the signing of the charge and its terms on 15<sup>th</sup> March, 2007.

This application therefore succeed subject to enforcement for instalments in arrears.

I have considered the issue of costs. Costs are discretionary. In my view both parties are guilty of unreasonableness. This court has said several times that debt in the finance market must not be treated like battle manoeuvres. ***Jeffrey Thindwa Vs George Gabriel Kaliwo Civ. Cause No. 676 of 1997.*** The parties must follow the agreement and let the law take its course. In costs the parties and the courts a lot of time and money when parties are bent on outwitting each other. This only makes the capital market expensive. Each party will, therefore, bear its own costs.

***Pronounced in Chambers*** this 5<sup>th</sup> day of February, 2008 at Blantyre.

E. B. Twea  
**JUDGE**