

**IN THE HIGH COURT OF MALAWI**  
**LILONGWE DISTRICT REGISTRY**  
**CIVIL CAUSE NO. 1171 OF 2005**

BETWEEN

FINANCE BANK MALAWI LIMITED ..... PLAINTIFF

AND

HON. DR. HETHERWICK NTABA ..... DEFENDANT

**CORAM : HON. JUSTICE A. NYIRENDA**

: Salima, Counsel for the Plaintiff

: Theu, Counsel for the Defendant

**JUDGMENT**

This is a case stated before this Court pursuant to section 145 of the Registered Land Act Cap 58:01 to determine two issues. First, it is sought to determine whether the defendant owes the plaintiff any money. Secondly, if he does, whether the defendant's property Title No. Nyambadwe 62 is security for that debt. It is only to that extent that the parties seek the intervention of this Court. In other words the parties are not interested in going as far as determining the actual amount, if any, that the defendant might owe the plaintiff.

This is a case where I should remind myself of the standard of proof in a civil cause, which is proof on a balance of probabilities. This reminder is critical in the nature of the evidence that is before me as I shall soon discuss but first I should present an overview of the circumstances surrounding the parties.

The short background is that the Plaintiff Bank says it advanced money to a trading company known as Yeyeye Trading and Transport Company to support the Company in the importation of coffin fittings and tyres. Of particular concern in this matter is the sum of K2,009,000.00 which the Plaintiff claims has not been paid back since it was advanced to the Defendant towards the end of 1996. I will get to the details soonest. It is further the Plaintiff's case that property described as Nyambadwe 62 or NY 13 is security for the debt according to the documents that were exchanged between the parties some of which have been exhibited.

On his part the Defendant denies liability and for the most part states that the alleged debt was that of Yeyeye Trading. The Defendant's position is that he played a very little role in facilitating the debt to the Company and that in any event he did not take part in the operations that followed including how the money was dealt with. It is contended that the man at the centre of the Yeyeye Trading Company was Mr. Tchongwe and that the Defendant and Hon. Gwanda Chakuamba were drawn in for their influence as at that time because they were high ranking officials of the Malawi Congress Party.

The Defendant states that property No. Nyambadwe 62 or NY 13 was not released to the Plaintiff as security of the credit facility given to Yeyeye Trading Company.

This case has given me quite some moments because of the nature of the exhibits which are all photocopies where in some instances it has been

very difficult for the court to make sense out of them. Unfortunately, the matter has been by way of depositions and therefore wholly dependant on affidavits. It seems to me this case should have been heard in open court for the deponents of the affidavits to be examined. We did not take that course and therefore have to contend with the procedure we have adopted.

On the 7<sup>th</sup> October 1996, Yeyeye Trading and Transport Company, by Exhibit PG 1, applied to the Plaintiff Bank to open an account. The application was supported by a Resolution of the Board of Directors of the Company, namely, Honourable Gwanda Chakuamba as Chairman, Honourable Doctor H. Ntaba as Secretary and Mr. Alex Tchongwe as Manager. The Resolution had been adopted the previous day the 6<sup>th</sup> October 1996 and perhaps to mention here that Yeyeye Trading and Transport Company is said to be a Limited Company.

On the 1<sup>st</sup> of November 1996 by Exhibit PG 6 Mr. Tchongwe, on behalf of Yeyeye, wrote the Plaintiff Bank and sought an overdraft. The amount sought by that letter was K1,000.000.00 which was intended to secure letters of credit in the amount of K900,674.80. This amount was meant to pay for a consignment of tyres.

Subsequently, the Plaintiff and the three Directors of Yeyeye engaged in a number of signed agreements towards the overdraft. On the 8<sup>th</sup> of November, 1996 the Defendant completed and signed a formal application Exhibit "VM 7". On the same day a Promissory Note was signed where the three Directors promised to pay on demand to the Plaintiff sums of money received with interest, exhibit "PG 7". On that same day a Letter of

Arrangement Exhibit “PG 4” was also signed providing for what would happen in the event of cancellation of the facility. Another document was signed but not dated Exhibit “PG 3” headed “Undertaking to Create Mortgage and Memorandum of Deposit of Title Deeds For Creation of Equitable Mortgage”.

There is something very odd about these last three documents. That is why I have said perhaps this matter should have been handled in open court to examine the deponents of the affidavits in some instances. Exhibits PG 3 is not dated and contains an amount of K2,009,000.00. Details of the property that is intended to be mortgaged are not entered. Exhibit PG 4 is dated but the spaces where the amount of money should have been entered are blank. Exhibit PG 7 is also blank in spaces where the sums of money should have been indicated. All these three documents are exhibited by Mr. Petro Gomani the Plaintiff’s Advances Supervisor. Mr. Gomani’s affidavit however does not explain why the documents are blank in the most critical areas.

Ironically the same documents are exhibited again by Mr. Viwemi Mzumara, the Plaintiff’s Assistant Manager Credit Services. Mr. Mzumara does not explain how the same documents which the Plaintiff had introduced without any entries now had entries property indicated and the details of the property entered. I note though that both Gomani and Mzumara were not with the Plaintiff Bank at the time material to these transactions. I can therefore well understand why they could not attempt explain the discrepancy.

In submitting for the Plaintiff Messrs Chagwanjira stress that these three documents are standard official documents which every customer of the Plaintiff completes when seeking financial support from the Plaintiff. It is submitted that the documents could never have been blank. This submission by Counsel could never have been intended to be evidence and therefore cannot explain the serious conflict between the documents of Mr. Gomani and those of Mr. Mzumara, both of them the Plaintiff's own employee and therefore must have obtained these documents from the Plaintiff's official records.

There is more to the matter that I should look at though which is in the affidavit of the Defendant. The critical paragraphs are 9,10,11,12,13 and 14. These paragraphs state as follows:

- “9. *Mr. Tchongwe had won two Government tenders to supply coffin fittings and motor vehicle tyres to the Controller of Stores. He went to Finance Bank of Malawi for some credit support in the form of an overdraft for Letters of Credit for importation of tyre and coffin fittings as we understood it.*
- 10 *The Bank was willing to do so provided that the Controller of Stores undertook to pay direct into an existing account at the Bank, and do so in 20 days after receipt of the goods. I exhibit with this deposition copies of letters marked “LL 1”, “LL 2”, “LL 3”, “LL 4”and “LL 5” evidencing the above position.*

- 11 *The Bank Manager, Mr. Chinthiti, that time (sometime early October, 1996), came to see Hon. Chakuamba and myself, with Mr. Tchongwe at Blantyre MCP Offices. He asked us to assist in guaranteeing Mr. Tchongwe's overdraft facility for the tender purchases. Hon. Chakuamba and I were approached in this manner as President and Treasurer General of the Malawi Congress Party respectively. The hope was that Mr. Tchongwe would be able to continue to help the Malawi Congress Party using the profits from the transactions for which he was seeking overdraft facilities from the Bank.*
- 12 *Upon being shown the written guarantees that the Controller of Stores would pay in 30 days after receipt of goods, and pay direct into a bank account, Hon. Chakuamba and myself agreed to give the guarantee for such a Bank facility. However, this was done on condition that we open a special project account and operate it jointly for these tender transactions and I understood that there must be joint signatures for cheques to draw from this account and for other transactions to ensure appropriate control.*
- 13 *Hon. Chakuamba, Mr. Tchongwe and myself, filled the relevant forms for opening the account, which was to be in the name of Yeyeye. However, I have not seen any cheques or statements to show how this account functioned, if it did function at all. I*

*exhibit to this deposition marked “LL 6” a copy of the account opening form.*

14 *Neither Hon. Chakuamba nor myself signed any cheques for this joint account nor did we see any statements of the account. Sometime after the account was opened the Bank Manager aforesaid however said everything was in order. He had already established the Letters of Credit, starting with tyres, followed by the coffin fittings”.*

What clearly emerges from these paragraphs is that the Defendant, Honourable Chakuamba and Mr. Tchongwe indeed applied for and an account was opened for them. It was a joint account which was to be operated in accordance with some arrangement among the three Directors of Yeyeye Trading and Transport Company.

I have also looked at the exhibits that were tendered by the Defendant. Among them is a letter from the Plaintiff dated 23<sup>rd</sup> November 1996, Exhibit LL 8. This exhibit, coming from the Defendant as it does confirms that an overdraft in the sum of K2,000,000.00 was granted to Yeyeye Trading as of that date. This letter is important because it also states the form of security for the overdraft. This is what it states:

Ref: DKN/AD/435/jc

23<sup>rd</sup> November 1996

The Managing Director  
Yeyeye Trading & Transport Co. Limited  
P.O. Box 2070  
BLANTYRE

Dear Sir

**RE: BANKING FACILITIES**

We refer to our recent discussion and are pleased to confirm that a limit of K2,000,000.00 (Two Million Kwacha) overdraft and a Letter of Credit was marked against your account for your working capital purposes to expire completely by 15<sup>th</sup> December 1996.

Interest is charged at our base rate plus 3% per annum and commitment fee was recovered upfront on the approved amount at 8.75% to be recovered upfront on the amount approved of letter of credit when established with full cash cover.

Interest is subject to change at the discretion of the Bank although such change will always be advised to you whenever it occurs.

This facility is secured by:

- Joint and several Guarantees of Directors
- Equitable mortgage over Residential property No. 813, Lunyangwa, Mzuzu said to be worth K1.3 Million.
- Professional valuation of the above residence value of at least K1.3 Million, required.

Please note that no further facilities will be allowed until this tyre transaction is finally and completely repaid.



We are legally obliged to advise that in line with Normal Banking Practice this facility remains repayable on demand at the sole option of the Bank.

Please sign and return a copy of this letter in acknowledgement and acceptance of the terms and conditions expressed herein.

Yours faithfully

**FINANCE BANK MALAWI LIMITED**

**M.S. CHINTHITI**

**CORPORATE MANAGER**

On a clear reading of this letter together with what the Defendant says in his affidavit and Exhibit “PG 1”, PG 6 and LL 6 it is confirmed to me that an overdraft was granted to Yeyeye Trading & Transport Company to facilitate Letters of Credit at least to the extent of K2,000,000.00. This therefore is where the matter was as of the 23<sup>rd</sup> November 1996 to the extent I can deduce from the documents and from some statements in the affidavits.

The matter however goes further. Mr. Mzumara states in paragraph 7 of his affidavit:

*“THAT Dr. Ntaba himself instructed Mr. Mbvundula of New Building Society, Lilongwe to send the Title documents for his house to the Bank which he did and confirmed as per letter dated 6<sup>th</sup> December 1996 by Mr. Mbvundula of New Building Society that the Title documents will be ready by 9<sup>th</sup> December*

1996. *A copy of such a letter is now shown to me and I exhibit it as “VM 9 a”.*

At paragraph 48, in response to paragraph 7 of Mr. Mzumara’s affidavit, the Defendant states as follows:

*“Yes the title documents were sent to Finance Bank on my instructions. That act in itself did not create an equitable mortgage in favour of the Bank neither did it surrender the property to the Bank as security for any of the above mentioned account. As in paragraph 4 of PG 5(a), this signified an intention to offer the property for LC facilities in conjunction with Yeyeye. This was never done as such. There is no evidence anywhere that I got around to doing this.”*

What comes out clearly from all this is that after the first overdraft the parties continued discussing further facilities which resulted in the Defendants offering property No. NY 13 or Nyambadwe 62. The letter by the Defendant Exhibit “PG 5” also “LL 7” is as follows:

Mr. M.S. Chinthiti

6<sup>th</sup> Deember, 1996

The Manager  
Finance Bank of Malawi  
Blantyre

Dear Sir,

**OFFER OF PROPERTY FOR GUARANTEE**

I wish to confirm the discussion I had with you on the above subject. In 1991, I cleared the mortgage which I had with the New Building Society on the property situated on plot number NY 13 in Blantyre.

My late brother George Ntaba had started the formalities of discharging the change but unfortunately he died before he completed the exercise. I only discovered 2 days ago that the process had not been completed because the New Building Society change on my plot still shows at the land registry.

The New Building Society Lawyer, Mr. Mbvundula assured me that this oversight will be corrected by Monday December, 9<sup>th</sup> 1996, when he will have the discharge process formalized and completed with an appropriate document, namely a land certificate obtained from the Lands Office for me.

My intention is to offer this property to Finance Bank as security for the LC and other facilities that I want to seek from you in conjunction with Yeyeye Trading. The property is a 4 bedroom house built on a fenced 2 acre plot in Chirimba plus an additional 8 acres of free hold land around the plot. The value of the land and building I believe will be in the region of K15 million and I intend to have the latest valuation done very soon.

I have accordingly instructed the New Building Society Lawyer to hand over the ownership documents to you when he completes the exercise. You will also recall that I am in the process of redeeming the property I have in Lilongwe from National Bank in Lilongwe for surrender to your Bank for the same purpose of guaranteeing the finance facilities I am seeking from you. You are aware of the details of this proposal from my earlier correspondence with your Lilongwe Office.

I shall be grateful if you could consider this proposal sympathetically so that we can get the facilities soonest.

Yours faithfully

**Dr. H. Ntaba**

Eventually a second letter of Credit was facilitated, which the Plaintiff wrote to Yeyeye Trading and Transport Company about In a letter dated 23<sup>rd</sup> December 1996 exhibit LL 9 also “VM 8”. Again I should set out this letter which is as follows:

Ref. No. MSC/AD/487/jc

23<sup>rd</sup> December 1996

The Managing Director  
Yeyeye Trading & Transport Co. Ltd  
P.O. Box 2070  
**BLANTYRE.**

### **BANKING FACILITIES**

Further to our letter dated 23/12/96 and following the establishment of a second letter of credit in respect of the importation of coffin fittings we are pleased to advise that the Company’s overdraft and letters of Credit facilities were reviewed and the new limits are as follows:

Overdraft K2,009,000.00 and  
Letters of Credits K1,947,743.00

These facilities are to expire on 31/12/96. Interest is to be charged at our base rate plus 4% per annum and a commitment fee of 1% over the approved amount. The letters of credit fees to be recovered upfront on the approved amount of L/C’s issued with full cash cover.

For security this is to be secured by a Guarantee by Mr. A.M.G. Tchongwe for K2,009,000.00 supported by:

- (a) EM over residential property on Plot No. 813 Lunyangwa, Mzuzu said to be worth K1.3 Million.
- (b) EM over two further properties in Mzuzu and Blantyre said to be worth K300,000 each K600,000.

- (c) We require independent professional valuation of each of three properties showing at least the state value.

Guarantee by Dr. H. Ntaba for full facility amount supported by an EM over residential property on plot No. NY 13, Blantyre said to be worth K1.5 million. A joint and several guarantee by all the Directors including Hon. G. Chakuamba.

It is our understanding and anticipated that the original L/C, whilst it was for K923,743, and overdraft of K985,000 will result in proceeds of K2 Million upon sale to Central Tender Board of the tyres, sufficient to repay the liability.

The increased facility covers the issuance of a further second L/C of K1,024,000.00 and corresponding overdraft amount K1,024,000. Upon sale of the coffin fittings the proceeds will be more than K1,930,000.00. All other areas and conditions remain the same.

Please sign and return copy of this letter in acknowledgement and acceptance of the terms and conditions expressed herein.

Yours faithfully  
**FINANCE BANK MALAWI LIMITED**

**M S CHINTHITI**  
**CORPORATE MANAGER**

My evaluation of the transaction thus far is that the second letter of credit was attracted by, among other securities, property Number NY 13 or Nyambadwe 62. It is this K1.5 million property mentioned in the Defendant's letter which is also referred to as plot No. NY 13, Blantyre said to be worth K1.5 million in the Plaintiff's letter. Again I must find that an overdraft was made available to Yeyeye Trading and Transport Company where the Defendant was one of the Directors.

Where does all this discussion place property No. NY 13 or Nyambadwe 62? A quick reaction would be that if this property was not available for the initial overdraft/letter of credit, it was certainly available for the second letter of credit. After all the defendant himself offered the property for that purpose.

But something in the discussions between the parties would suggest a different conclusion. Both Exhibits “LL 8” and “LL 9” end with the following paragraph:

*“Please sign and return a copy of this letter in acknowledgement and acceptance of the terms and conditions expressed herein”.*

I have no intention of reading a lot into this paragraph. I have already discarded Exhibits “PG 3”, “PG 4” and “PG 7”. There is no evidence of a signed response to Exhibits “LL 8” or “LL 9”. It is clear that something needed to be done to complete the transaction which was not done as expressed and expected by the parties. Really what would I call a written memorandum of the terms of the guarantee in terms of the Statute of Frauds 1877. The Letter of Guarantee, Exhibit “PG 2” is certainly not such memorandum because it does not relate to or make any reference to property NY 13 or Nyambadwe 62.

Exhibit “PG 2” is merely an additional guarantee to any other guarantee the parties might have deemed fit to execute. It certainly does not commit the property in question to the overdraft and or letter of credit.

I must confess this matter has presented me with a very strange scenario. For the most part it was counsel on both sides attempting as much as they could fill in gaps in the evidence. The documents tendered on both sides were disorganized and in some cases unhelpful to explaining the sequence of events. As a result it has taken me a great while to find my way through which I have done in the best manner I could possibly do. In the end though and for all that I have said my determination of the matter to the extent required by the parties is as follows:

- (a) That the Defendant does owe the Plaintiff money.
- (b) That property known as Nyambadwe 62 or Plot No. NY 13 is not security for that debt.

The outcome of the matter is split. It is only fitting that I make an order that each party pays own costs. I accordingly do.

MADE in Chambers at Lilongwe this 8<sup>th</sup> day of February, 2008.

A.K.C. Nyirenda  
**J U D G E**