



JUDICIARY  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NO 400 OF 2014



**BETWEEN:**

**VITUMBIKO SOKO ..... PLAINTIFF**

**-AND-**

**CHIMERA BREWERIES ..... DEFENDANT**

**CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA**

Mr. Jere, of Counsel, for the Plaintiff

Messrs. Msungama and Maliwa, of Counsel, for the Defendant

Ms. Jessie Chilimapunga, Court Clerk

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**JUDGEMENT**

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*Kenyatta Nyirenda, J.*

This is the Plaintiff’s action against the Defendant for breach of a motor vehicle hiring agreement. The Defendant denies liability.

The statement of claim is couched in the following terms:

- “1. *The Plaintiff was at all material times the owner of a motor vehicle registration number LL 1350 Mitsubishi Canter.*
2. *By a verbal agreement entered into between the Plaintiff and the Defendant in or around April 2014 the Defendant agreed to hire the Plaintiff’s said vehicle for an indefinite period at a fee of K10,000.00 per day from 24<sup>th</sup> April, 2014.*
3. *Following the said agreement the Plaintiff delivered his said vehicle to the Defendant, who has been in custody/possession of the same since 24<sup>th</sup> April, 2014.*
4. *Since the Defendant’s hire of the Plaintiff’s said vehicle the Plaintiff has only received payment once in respect of the period being 24<sup>th</sup> April to 24<sup>th</sup> May, 2014.*

**Particulars**

<b>Cheque No</b>	<b>Date</b>	<b>Amount</b>
000572	03/06/14	K300,000.00

5. *In breach of the agreed terms of payment between the parties that payment should be made after every 30 days, no further payment has been made by the Defendant since the initial payment of 3<sup>rd</sup> June, 2014.*
6. *Owing to the Defendant's breach of agreement the Plaintiff through his legal practitioners wrote the Defendant on 8<sup>th</sup> September, 2014 demanding payment of all outstanding hire charges and the return of his vehicle by 12<sup>th</sup> September, 2014.*
7. *Despite the Defendant's default in complying with the terms of the agreement, the Defendant without any justifications has failed/neglected to return the Plaintiff's said vehicle and implicitly has refused to return the said vehicle.*

*AND the Plaintiff claims:*

- (i) *the sum of K1,100,000.00 being the hiring charges for the period 25<sup>th</sup> May to 12<sup>th</sup> September, 2014 which is the effective date of termination of the agreement herein;*
- (ii) *interest on the said sum at 1% above National Bank of Malawi lending rate from 13<sup>th</sup> September, 2014 to the date of the final payment;*
- (iii) *replacement value of the Plaintiff's vehicle to be assessed; and*
- (iv) *costs of the action."*

The Defendant filed the following defence:

- "1. *The Defendant makes no comment to paragraph 1 of the Statement of Claim.*
2. *The Defendant admits the contents of paragraph 2 of the Statement of claim and further state that the agreement was to pay for the vehicle only when it had been used.*
3. *The Defendant admits the contents of paragraph 2 of the Statement of claim and further state that as with other vehicles that they hire from people, the vehicles are not kept at their premises but go back to their respective owners and only come back in the morning.*
4. *However, the plaintiff asked the defendants if the vehicle can be kept at the defendant's premises since he has no place on which to keep the vehicle and the defendants allowed him because they knew him very well.*
5. *The Defendants refer to paragraph 4 of the Statement of Claim and state that they paid the plaintiff after using the vehicle for thirty days through a cheque.*

6. *The Defendants repeats paragraph 5 above and state that however, a few days after payment, on 4<sup>th</sup> June, 2014 the Defendant's premises at Zingwangwa New Lines was robbed and the robbers took the vehicle with them.*
7. *The Defendants informed the plaintiff of the matter. Fortunately, the robbers were apprehended but the vehicle had already been disposed off. They were prosecuted in the magistrate court sitting at Blantyre under criminal cause number 538 of 2014, whereby after being granted bail, the robbers escaped and are nowhere to be found.*
8. *The Defendants refer to paragraphs 5, 6 and 7 of the statement of claim and deny that they breached any terms of the agreement as the failure to pay has been due the theft of the vehicle and it has not been in use since then.*
9. *The Defendants deny that they owe the Plaintiff any money or that the plaintiff is entitled to the reliefs sought since he had consented to keeping his vehicle on the defendant's premises at his own risk.*
10. *The Defendant therefore prays that:-*
  - 10.1 *That the action be dismissed for lacking merit;*
  - 10.2 *That the agreement was terminated by frustration;*
  - 10.3 *Costs of this action."*

Hearing of the Plaintiff's case took place on 24<sup>th</sup> July 2017. The Plaintiff relied on his own testimony. He adopted his witness statement dated 28<sup>th</sup> February 2015 and this constituted his evidence in chief. The contents of the witness statement mirrors more or less the averments in the statement of claim with the following additional information:

3. *I bought the said vehicle on or about 22<sup>nd</sup> February 2014 at the price of K4,5000,000.00 ...*
- ...
8. *My demands for payment and the return of my vehicle have been met by assertions that my said vehicle was apparently stolen from the Defendant's premises.*
- ...
10. *My enquiries reveal that a replacement vehicle would now cost in the region of K4,893,000.00...*
11. *I therefore pray that I be awarded the sum of K4,893.000.00 as the replacement value of my said vehicle."*

The Plaintiff tendered a copy of the sale agreement, a certificate of registration and a quotation in respect of a replacement motor vehicle.

During cross-examination of the Plaintiff by Counsel Msungama, the Plaintiff admitted that he was informed that his motor vehicle had been stolen. The following Q & A then ensued:

Q: The Defendants had two guards?

A: Yes! It is true

Q: In view of this, were the guards not enough?

A: No! They were not sufficient

Q: What would be adequate security?

A: The place had no security alarm.

Q: Would the alarms have made any difference?

A: Yes, because it took time for the robbery to be effected

Q: How would the tied guards have been able to switch on the alarm?

A: No!

Q: Do you know if the thieves were caught and tried?

A: Yes! I know

Q: The thieves were also convicted by the court?

A: Only one person was convicted

Q: In that regard, why do you still blame the Defendant?

A: Because I left my car in its hands

In re-examination, Counsel Jere asked the Plaintiff why he stated that two guards were not enough and his answer was that he expected that the premises would be

equipped with alarms and that the guards would be armed. He explained that the alarm would have alerted the Company head office or people outside the premises.

The Plaintiff also stated that only one guard was tied up and as such he expected the other guard to raise an alarm. The Plaintiff also accused the Defendant of being negligent in that the car keys were left with the guards instead of locking them in a secure place.

Counsel Jere closed the Plaintiff's case. Then Counsel Msungama sought an adjournment. He informed the Court that the Defendant was having problems tracing its two witnesses because they had ceased working for the Defendant. Continued hearing of the case was set for 18<sup>th</sup> January 2018.

On the set hearing date, Counsel Msungama informed the Court that M/s Knight & Knight were to cease representing the Defendant because they were having problems in getting proper instructions and due to the Defendant's non-payment of legal fees. In view of this development, the case was adjourned to 21<sup>st</sup> February 2018 and the Plaintiff was ordered to serve the Notice of Adjournment directly on the Defendant.

Come 21<sup>st</sup> February 2018, the case was called at 9:15 in the forenoon. There was default of appearance by the Defendant, either in person or by counsel, and there was also no explanation before me for the default.

Order 16, r.7 (1) of the Courts (High Court)(Civil Procedure) Rules [hereinafter referred to as "CPR"] comes into play where there is failure to appear by both parties or either party and it reads as follows:

*"The Court may proceed with a trial in the absence of a party but—*

- (a) where a party does not attend the trial, it may strike out the whole of the proceeding;*
- (b) where a claimant does not attend, it may strike out his claim and any defence to a counterclaim; and*
- (c) where a defendant does not attend, it may strike out his defence and dismiss his counterclaim."*

Relying on the above-mentioned provision, Counsel Jere asked the Court to strike out the Defence and have judgement entered in favour of the Plaintiff. Counsel Jere also advanced an alternative opinion. He submitted that, as the Plaintiff had already given his evidence, the Court should proceed to enter judgement based on that evidence.

I have read and re-read CPR and I have found no provision therein to sustain the alternative option put forward by Counsel Jere. This perhaps explains why Counsel Jere cited no authority to buttress his submissions regarding the alternative view.

Acting pursuant to Order 16, r.7 (1) of CPR, I am inclined to exercise my discretion by having the Defence struck out. In these circumstances and by virtue of the foregoing, judgement is entered in favour of the Plaintiff, per the statement of claim, as follows:

- “(i) *the sum of K1,100,000.00 being the hiring charges for the period 25<sup>th</sup> May to 12<sup>th</sup> September, 2014 which is the effective date of termination of the agreement herein;*
- (ii) *interest on the said sum at 1% above National Bank of Malawi lending rate from 13<sup>th</sup> September, 2014 to the date of the final payment;*
- (iii) *replacement value of the Plaintiff's vehicle to be assessed”*

I further order that the replacement value of the Plaintiff's motor vehicle be assessed by the Registrar. Costs are for the Plaintiff. It is so ordered.

Pronounced in Court this 22<sup>nd</sup> day of March 2018 at Blantyre in the Republic of Malawi.



**Kenyatta Nyirenda**  
**JUDGE**