



REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 28 OF 2016

**BETWEEN**

BARNET GAUSI.....PLAINTIFF

**AND**

BLANTYRE CITY ASSEMBLY.....DEFENDANT

Coram: **WYSON CHAMDIMBA NKHATA**

Ulaya- of Counsel for the plaintiff

Mbale- of Counsel for the defendants

Chitsulo- Court Clerk and Official Interpreter

### **RULING**

The plaintiff in this matter took out a writ of summons which was issued on 18<sup>th</sup> of January 2016 against the defendant claiming repayment of the sum of K568,000.00, interest thereon at the prevailing bank lending rate and costs of this action. By a consent judgment dated 24<sup>th</sup> of April 2018, the parties agreed as follows:

1. The defendant do pay the claimant the sum of K568,000.00 being repayment of money paid by the claimant to the defendant as development fee in respect of plot number MZ/M/62.

2. The issue of whether the claimant is entitled to interest on the sum of K568,000.00 as pleaded in the statement of claim shall be determined by the Registrar upon the claimant filing the necessary application.
3. The issue of costs shall be determined by the Registrar together with the issue of interest.

Pursuant to the said consent judgment, this is the claimant's application for the determination of the issue of payment of interest on the sum of K568,000.00 being repayment money in respect of plot number MZ/M/62. The application is supported by an affidavit sworn by Mr. Ulaya of Counsel in which he deposes that in 2011 the claimant was offered by the defendant Plot number MZ/M/62 located at Mpingwe density Housing area at a price of K567,000.00. He exhibits a copy of the offer letter marked MTM1. On 4<sup>th</sup> July 2011 the claimant accepted the offer and paid the sum of K568,000.00. It is stated that the defendant acknowledged receipt of the payment of the payment by the claimant by issuing a receipt. He exhibits a copy of the receipt marked MTM2. He further deposes that the claimant later discovered that the defendant allocated the same plot to an unknown person and who was constructing on the land. Despite the claimant lodging a complaint on the issue with the defendant the defendant did not address the issue by the paying back his money or allocating him another plot. Due to the defendant's failure to address his complaint, the claimant commenced the present proceedings to compel the defendant to pay back his money. The defendant agreed to pay back the claimant's money in April 2018 when a consent judgment was signed by the parties. The claimant is however yet to receive the money. Counsel is of the view that from the foregoing it is clear that the defendant unlawfully kept the claimant out of his money which he could have invested and earn interest on it. He is of the opinion that this is a proper case for court to exercise its equitable discretion and award the claimant compound interest on the money which the defendant unlawfully held from the date he paid the money to the defendant to the date of repayment. He therefore prays for the award of interest on the sum of K568,000.00 at 5 % above the bank lending rate from the date of payment to date of repayment.

The defendant through Counsel filed Skeletal Arguments in opposition of the application where it is averred that the money was fraudulently paid to the defendant and hence they contend that the claimant cannot benefit from an illegality. It is stated that the defendant never issued the purported letter but it was rather obtained by the claimant through fraudulent means. The claimant is therefore not entitled to interest because the award of interest would lead to the claimant benefitting from his illegal acts. This would result in unjust enrichment on the part of the claimant to the expense of the defendant. It is further averred that this is fortified by the fact that the defendant never offered any plot to the claimant. Counsel for the defendant is of the view that it is rather the claimant's backdoor and fraudulent transaction that he found himself in this mess. He therefore believes that compelling the defendant to pay interest and costs on a



matter which the defendant never foresaw and which was created by the claimant's own fraudulent conduct would lead to gross unjust enrichment. It is his prayer that the application be dismissed with costs.

The issue that is coming for consideration before this court is whether in the circumstances the court can award the plaintiff interest. In response to this question the starting point would be the observation that an award of interest by this court is discretionary and that the basis for the award is the fact that the defendant has kept the plaintiff out of his money; and has had use of it himself. So he ought to compensate the plaintiff accordingly. This was per Lord Denning in **Harbutt's Plasticine Ltd v Wayne Tank & Pump Co. Ltd** [1970] 1 Q.B. 447. The same sentiments were echoed by Justice Katsala in **National bank of Malawi v Central Africana Produce Ltd**, Commercial Cause number 74 of 2014 where he stated that in today's world no one can have or should be allowed to have use of someone's money for free or at a minimal cost. So, if someone wrongfully keeps and withholds another person's money and that other person is driven to have recourse to litigation in order to recover the money it is only fair and just that he must be ordered to compensate the other for wrongfully withholding of the money.

However, in the exercise of its discretion, the court in Malawi has to bear in mind that its jurisdiction has been limited by s.11(a) (v). Further, it was the decision of the Supreme Court of Appeal in the case of **Gwembere v Malawi Railways Ltd.**, 9 MLR 369, at page 378, that sub-paragraph (v) does not provide that interest can be claimed as of right but that it allows the court discretion to direct the payment of interest but only in the cases of debt as distinct from damages. The principle basically states that when money is owing from one party to another and that other is driven to have recourse to legal proceedings in order to recover the amount due to him, the party who is wrongly withholding the money from the other ought not, in justice, to benefit by having that money in his possession and enjoying the use of it, when the money ought to be in the possession of the other party who is entitled to use it.

In applying the above principles to this instance, it is noted that the matter involves money that the claimant paid to the defendant in order to acquire a plot. There is a consent judgment indicating that the defendant agreed to pay back the said money apparently after the defendant allocated the plot in question to another person. I believe the said claim falls within the ambit of s.11 of the Courts Act. I take note that the defendant opposes the application on the basis of unjust enrichment in that the claimant fraudulently paid for the plot. Counsel for the defendant cites the case of **Mwakamogho v National bank of Malawi Ltd** Civil Cause No. 681 of 2001 in which Justice Twea, as he was then, stated that it is a known principle of law that no court will lend its aid to a man who founds his cause of action on an immoral or illegal act.... Clearly is a matter of public policy which cannot be overemphasized. However, looking at the circumstances of this case as aforesaid the defendant willfully entered into a consent judgment for the

repayment of the money that the claimant claims to have paid to the defendant. If the defendants had perceived fraud in the claimant's dealings, one wonders why they did not let the matter proceed to full trial for the court's determination of the cogency of the claims by the parties. Essentially, there is no judgment indicating that there was fraud in the dealings by the claimant. As it stands, I am compelled to believe that the claimant paid money to the defendant in order to acquire a plot and the said plot was later allocated to another person by the defendant. In fact, there is evidence for the payment in form of a receipt marked "MTM2". In my opinion, it would be unconscionable for the defendant to have admittedly received the claimant's money and kept it in circumstances where the claimant did not even get what he paid for and later be deprived interest on the same.

On the authority of s.11 of the Courts Act cited above this court awards the claimant interest on the sum K568,000.00 at 5% above the prevailing bank lending rate. I further award the claimant costs of this action.

DELIVERED IN CHAMBERS THIS 20<sup>th</sup> DAY OF AUGUST 2018

  
WYSON CHAMDIMBA NKHATA

ASSISTANT REGISTRAR