

IN THE HIGH COURT OF MALAWI
COMMERCIAL DIVISION
PRINCIPAL REGISTRY
COMMERCIAL CASE NO. 142 OF 2022

(BEFORE JUSTICE KEN MANDA)

BETWEEN

MYBUCKS BANKING CORPORATION LTD.....CLAIMANT

-AND-

KAMPHINDA GOWA NYASULU t/a TIYUNI INVESTMENTS..... DEFENDANT

CORAM

Manda J

Mazambani for the Claimant

Nthewa for the Defendant

Kachimanga, Court Clerk

RULING

This was the claimant's application for declaratory orders which was taken out under Orders 10, rule 1 and Order 19, rule 27 of the Civil Procedure Rules, 2017. The declaratory orders being sought by the claimant were spelt out as follows:

1. That judgment on liability having been entered against the defendant under a Consent Order dated 8th December, 2022, it should be ordered that the defendant owes the claimant the sum of MK313, 111, 850.33
2. A declaratory order that the claimant is entitled to sell property Title Number 49/6/133, which was pledged as security for loans which had been advanced to the defendant
3. A further order compelling the defendant to cooperate with the claimant bank in "all processes concerning its exercise of power of sale of the property in question"

The defendant has opposed the application.

Background

The brief background of this matter is that the defendant took some loan from the claimant bank on which he defaulted. The defendant did not deny owing the claimant and when the matter came for mediation, the defendant intimated as such. The only thing the defendant raised was that the amount that the claimant was claiming from him seemed to be on the high side. The defendant thus stated that he needed to sit down with the bank to determine the exact amount that he owes the bank. On this note, it was opined by this court that judgment on liability should be entered and then the parties would agree on the amount that was owed. The parties were given 7 days to determine how much was owed. This was the initial direction from the court. It was also a further direction of this court that the interest and costs would be assessed and taxed by the Assistant Registrar if not agreed.

On the 8th of December, 2022, the parties filed an “agreed order” in which they agreed as follows

1. Judgment on liability is entered for the claimant
 - 1.1. The parties shall agree on the amount owing to the claimant and the payment terms within 14 days from the date hereof
 - 1.2. If the parties fail to agree within the period stipulated in 1.1 above, the matter shall be referred to the Assistant Registrar for assessment
 - 1.3. Cost be for the claimant and to be taxed if not agreed by the parties.
2. The action herein is wholly withdrawn upon full payment of the agreed amount

I must state that I was not aware that the parties had filed the agreed order since the same was taken to the Assistant Registrar for endorsement. I only become aware of the same after the claimant filed a certificate of non-compliance on the 13th day of April, 2023 in which the claimant stated that the defendant was in default of the agreed order. On this note I did issue a notice setting down the matter so that I should find out what was going on. Before we could have that hearing, the claimant filed this application.

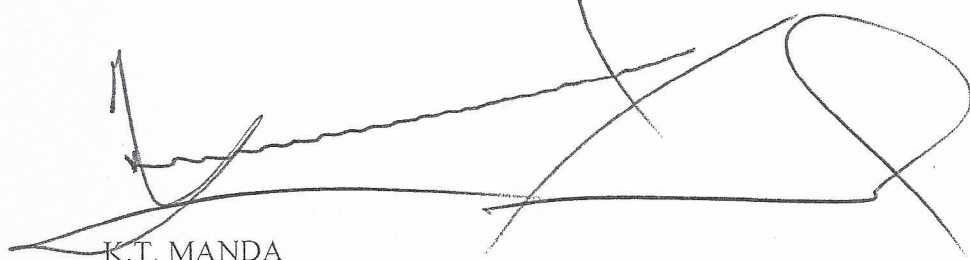
Now let me start with the agreed order. What is clear from that order is that it went against the direction of the court. What the court directed at the time was that judgment should be entered on liability since the defendant was not disputing that he owed the claimant bank money. The only issue that the defendant raised was that the amount that he owed was less than what the defendant was claiming. The direction was therefore that the parties were to go and do a reconciliation of the amount owed and report back to the court. Having given this direction, the defendant did not seem to understand what was going on, at which point it was explained to him.

For purposes of clarity, I did state that once they agree on the principal amount, everything else would be assessed by the Assistant Registrar. And by this I meant the interest and costs. I obviously would not refer the matter of the principle sum for assessment since that would require a trial. The Assistant Registrar cannot conduct a trial. On this note I must then express surprise as to why

It is imperative that litigation must come to an end. In the context of this matter, where the defendant is not denying owing the bank, I am of the considered view that this matter should be put to rest. The defendant clearly does not have a defence in this matter. He wants to have his cake and eat it. He borrowed money, used it, never repaid the money for over 6 years (except for a measly MK600 000), and now he wants to "protect" his property! That can never be just and fair!

As a Judge seized of this matter, having assessed what the defendant probably owes the claimant and for purposes of good case management, I will enter judgment for the claimant for the sum of MK313, 111, 850. 33, plus interest. I will also award the claimant the costs of this action. The interest and costs will be assessed and taxed, respectively, if not agreed.

Made in Chambers this.....day of.....2023


K.T. MANDA
JUDGE