

IN THE MALAWI SUPREME COURT OF APPEAL

M.S.C.A. CIVIL APPEAL NO. 8 OF 1986
(Being Civil Cause No. 158 of 1984)

BETWEEN:

W.H. KANJIRA APPELLANT

- and -

M.T. MSUNGAMA RESPONDENT

Before:

The Honourable Mr. Justice Banda, J.A.
The Honourable Mr. Justice Unyolo, J.A.
The Honourable Mr. Justice Mtegha, J.A.

Fachi, Counsel for the Appellant
Chiudza Banda, Counsel for the Respondent
Kadyakalo, Law Clerk
Longwe, Court Reporter

JUDGMENT

Mtegha, J.

This is an appeal against a judgment of Jere J. in which he awarded the respondent the sum of K6,199-00 damages being the value of a maize mill bailed to the appellant and which the appellant had declined to return to the respondent. He further awarded the sum of K2,446-65 being arrears of rent of the same mill.

The facts of the case appear to be these. Prior to this dispute the parties were the best of friends. Sometime in 1981, the respondent, who is a businessman running grinding mills business, left his mill at Brown and Clapperton (B & C) to be repaired. B & C asked him to pay a deposit of K200-00 before they could commence the repairs. At the same time he was desirous to purchase a second hand engine from them; but he had no money to pay for either the deposit or to buy the engine. As a result he told one Dzanjalimodzi, an employee of B & C to look for a customer to purchase the mill which he left at B & C for repairs. For the sake of clarity, as it will shortly transpire, this mill is the one which the trial Judge termed mill No.1. Sometime in April, 1981 the respondent went to the office of Dzanjalimodzi to find out whether a customer had been found to purchase mill No.1. While discussing the appellant came into the office. After hearing the discussion on the mill, he said he too was anxious to buy a mill. Accordingly they all went to the workshop and the appellant had a look at mill No.1. The price was negotiated at K1,000-00. The appellant gave a cheque payable

to B & C so that the respondent could get the engine which was on sale there. He got the engine. The facts also reveal that after about a week the appellant went to the respondent's Estate known as Thawira Estate to collect a letter from the respondent addressed to B & C authorising B & C to release mill No.1 to the appellant. At that time the appellant saw another mill lying on the verandah of the respondent's house. This is the mill which the trial Judge called mill No.2. Having inspected it the appellant asked if he could use it during the period when mill No.1 was being repaired at B & C. It was agreed that the appellant could take the mill at a rental of K40-00 per month. The value of the mill was K7,199-00. The appellant took mill No.2 and used it, but never paid any rents. Despite repeated requests to pay the rent the appellant did not pay. A row therefore ensued. The respondent reported to police for assistance to get mill No.2 back; but to no avail. It was on these facts that the Court gave judgment for the respondent.

There are five grounds of appeal submitted by the appellant namely,

- (i) That the learned Judge erred in saying that the plaintiff wrote a letter to the defendant asking for rental as there is no basis for such finding.
- (ii) The learned Judge erred in saying that there was an agreement for rent as the evidence and surrounding circumstances clearly show that there was no rental agreement.
- (iii) The learned Judge erred in his interpretation of the letter written by the defendant referred to in the judgment marked Exhibit 1.
- (iv) The learned Judge erred in not finding as a fact that there was an agreement for the sale of Mill 2 and that performance was completed.
- (v) The judgment by the lower Court cannot be supported having regard to the totality of the evidence.

Mr. Fachi, on behalf of the appellant has argued grounds 1

and 2 together. We shall follow the same pattern.

It was his submission that there was no basis for a finding that the respondent wrote a letter demanding rental for mill No.2. I would appear that Mr. Fachi's argument hinges upon the absence of a letter written by the respondent, but he informed the Court that he had written to the appellant asking for the rent, but a copy of that letter cannot be found due to lapse of time. In support of this piece of evidence the respondent produced a letter which the appellant wrote to the respondent in reply to the respondent's letter, dated 21st August, 1981. It may be prudent if we reproduce the said letter here. It states:

"PURCHASE OF MILL LB7 FROM MR. MSUNGAMA IN
EXCHANGE FOR THE ENGINE AT B & C CHEQUE
NO. LS/C 0310 OF K1,000-00 DATED 30-4-81
WITNESSED BY MR. DZANJALIMODZI

With the lapse of time after the payment of the engine which you had wanted to purchase in exchange with the Mill Model LB7, I have come to the conclusion that it is better to bring the mill that you had stated was at B & C before we start discussing anything in connection with the mill which I have now as you gave me this mill because of the delay in the repair of the mill at B & C as you wanted the engine immediately.

Please try to redeem that mill at B & C quickly so that everything should go well as businessmen.

Yours,

W.H. Kanjira "

We are in agreement with the observations made by the trial Judge that this letter could only be written in reply to the demand for the return of mill No.2 and the payment of rent. He was fortified in his findings by the additional evidence of the respondent's wife, the police officer and to a certain extent Mr. Dzanjalimodzi.


It was further Mr. Fachi's contention that since the respondent reported the matter to police as theft, and that the letter of demand to the appellant from the respondent's Legal Practitioner did not include a demand for rent, it shows clearly that there was no agreement for rent. We are unable to subscribe to this submission. The report of theft of the mill No.2 to police may be evidence that mill No.2 was not sold to the appellant. Again in our view, the learned Judge rightly answered Mr. Fachi's second point by saying "that such demand letters cannot create or extinguish rights and obligations which exist or do not exist after the period in issue."

It was also argued on behalf of the appellant that the respondent had sold mill No.2 to the appellant and not mill No.1 which was at B & C and that the respondent changed his mind because his father was pressurising him to produce mill No.2 which did not belong to the respondent and that if he had sold mill No.1 which was at B & C to the appellant, the respondent should have given him a letter to collect it, which he did not. The answer to the former point is that if the mill did not belong to the respondent but to his father, then he could not lawfully sell it and consequently the sale was vitiated as the respondent could not pass ownership of the same to the appellant. We are also of the view that it was mill No.1 that was sold to the appellant because of the evidence of the respondent himself and one Dzanjalimodzi. These witnesses clearly stated that the K1,000-00 was paid for the mill at B & C after the appellant, respondent and Dzanjalimodzi had inspected it at B & C. There is no evidence to show to the contrary; in fact the respondent's evidence that he rented mill No.2 to the appellant because mill No.1 at B & C was taking long to repair and that the appellant wanted to raise money to expedite the repair of the mill at B & C sounds more plausible.

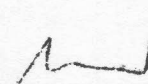
For these reasons we are unable to interfere with the learned Judge's findings. We would dismiss this appeal in its entirety. We enter judgment for the respondent in the sum of K6,199-00 and also K40-00 rentals per month with effect from May, 1981 up to the date when judgment debt is fully paid.

DELIVERED at Blantyre this 28th day of November, 1988.

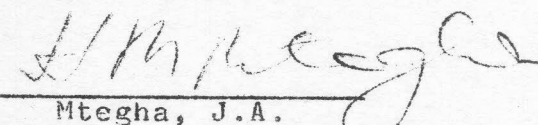
(Signed)


Banda, J.A.

(Signed)


Unyolo, J.A.

(Signed)


Mtegha, J.A.