

IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

MSCA CIVIL CAUSE NO. 20 OF 2010

(Being High Court Commercial Cause No. 135 of 2008)

BETWEEN:

FINANCE BANK OF MALAWI LIMITED (IN LIQUIDATION).....1ST APPELLANT
LAND PROPERTY AGENTS.....2ND DEFENDANT

- AND -

MDC LIMITED.....1ST RESPONDENT
MDC SPORTS CLUB LIMITED.....2ND RESPONDENT

BEFORE: THE HON. JUSTICE TAMBALA, SC, JA
THE HON. JUSTICE TEMBO, SC, JA
THE HON. JUSTICE NYIRENDA, SC, JA

Mpaka, Counsel for the Appellant
Kainja, not present, Counsel for the Respondent
Mwale, Recording Officer
Singano (Mrs), Senior Personal Secretary

JUDGMENT

NYIRENDA, SC, JA

Justice Kapanda of the High Court (Commercial Division) by his ruling of the 12th June, 2009 found for the respondents, who were then the plaintiffs, against the first defendant, the appellant in the present appeal, and the second defendant. The sole question for determination in this appeal is how the orders made in the ruling referred to should be complied with owing to subsequent orders that the learned Judge made. The facts will put the appeal in perspective.

The background is that the respondents obtained a loan of K12,000,000.00 from the appellant. The loan was secured on property title number Likabula 188, otherwise known as MDC Stadium. The respondents failed to service the loan resulting in the appellant moving in to realize the security thereof. In order to liquidate the security the appellant engaged the services of the 2nd defendant who diligently sold the property to the Football Association of Malawi. The property was sold at K22,000,000.00 and the 2nd defendant deducted a commission of K2,000,000.00 well in advance, which was the agreed ten percent commission with the appellant. The rest of the purchase price was being paid by instalments. Obviously upon the entire K22,000,000.00 being paid and upon the appellant realising their loan in full, the balance of the purchase price was payable to the respondents by the appellant.

In a separate and unrelated transaction the appellant owed the second defendant the sum of K9,017,244.26. The second defendant had already obtained judgment in that sum. In the second defendant's wisdom or for lack of it, they decided to help themselves to the proceeds of sale of property Likabula 188 and refused to remit the sum of K9,017,314.28 to the appellant which amount of money the appellant was to pass on to the respondents as being the balance on the purchase price.

The matter before Justice Kapanda, in substance, was whether the 2nd defendant was entitled to withhold that amount of money as they did and in the circumstances of the matter. There was a preliminary question whether the 2nd defendant was at all

properly joined as a party to the action since there was no direct relationship between the respondents and the 2nd defendant.

The learned Judge had no difficulties, and rightly so in our own view, in finding that the 2nd defendant was properly joined as a party and further that 2nd defendant was wrong in withholding the money. It is here that we must set out the specific Orders that the Judge made; only to the extent relevant to the appeal before us:

The conclusion of the ruling states:

“The long and short of it is that the plaintiffs have made out their case against the 1st and 2nd defendant. I so find and conclude. Accordingly, this Court makes the following Orders reflecting the conclusions and findings made above. The 1st defendant has no lawful excuse to refuse to remit to the claimant the excess monies realized by the 1st defendant during the sale of MDC Stadium. The 2nd defendant has no lawful excuse for withholding the proceeds of charged property sold by the Chargee through their agency. Actually, the 2nd defendant’s retention of the sum of K9,017,314.28 being the balance of the purchase of price of the sale of charged property is outside the scope its authority as an agent for the 1st defendant.

The plaintiffs are entitled to claim interest against the defendants herein for wrongfully depriving them of their monies from 28th July, 2006 to date. In my judgment the plaintiff having proven to the sufficient standard that the money withheld from them rightfully belong to the plaintiffs it goes without saying that they are entitled to receive the withheld money plus interest as pleaded. Accordingly, the sum of K9,017,314.28 so withheld is payable plus interest hereon at the current commercial bank’s lending to the date of full payment. The said interest is to be assessed by the Assistant Registrar of this Court.

The 2nd defendant was correctly joined as party to this action. Therefore, under R.S.C. Order 15, Landed Property Agents was correctly joined as a defendant to the plaintiff action. Indeed, as a result of that the Court was able to determine whether or not the 2nd defendant was at law entitled to set off the sums owed to it by the Bank against the proceeds of sale received on behalf of the Bank. The 2nd defendant was bound to pay the money over to the Bank by virtue of Section 287 of the Company Act, 1984 so that the money was eventually remitted to the liquidator of the plaintiffs.”

Almost six months after the ruling, on the 1st of December, 2009, and astonished that the money was not forthcoming, the first and second respondents took out summons to fix time for payment of the judgment debt. The order which the learned Judge made is what prompted this appeal. It was as follows:

*"The Court having heard Counsel for the plaintiff and the 1st defendant **HEREBY ORDERS** the 1st defendant to pay the judgment debt within 14 (fourteen) days from the date of this Order.*

Dated 11th day of December, 2009."

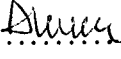
By this appeal the appellant contends, in the main, that the Order above was meant to put into effect the ruling of the 12th June, 2009. Unfortunately in trying to do so the learned Judge ended up virtually excluding the 2nd defendant from liability.

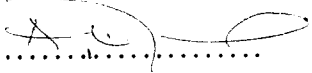
We hasten to agree with the appellant. The Order of 11th December, 2009 in effect materially varies and substantially distorts the ruling of the Court of the 12th June 2009. As a matter of fact by leaving out the 2nd Defendant from enforcement, the Order in effect substantially defeats the ruling of the 12th June, 2009 because the main thrust of that ruling was to require the 2nd defendant to pay the money over to the appellant in order for the appellant to pay it to the respondents.

Clearly this appeal should be allowed and we think we can expedite the process of recovery of this debt which is now long overdue owing to the unprofessional conduct of the 2nd defendant. We think we are entitled to order that the 2nd defendant should pay, forthwith, the sum of K9,017,314.28, with interest as ordered by Court below, directly to the respondents.

We make no order regarding costs in respect of the appeal and indeed none have been sought.

PRONOUNCED in Open Court at Blantyre this 16th day of September, 2010.

Signed.....
D.G. Tambala, SC, JA

Signed.....
A.K. Tembo, SC, JA

Signed.....
A.K.C. Nyirenda, SC, JA