

IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NO. 1171 OF 2005

BETWEEN

FINANCE BANK MALAWI LIMITED PLAINTIFF

AND

HON. DR. HETHERWICK NTABA DEFENDANT

CORAM : HON. JUSTICE A. NYIRENDA

: Salima, Counsel for the Plaintiff

: Theu, Counsel for the Defendant

JUDGMENT

This is a case stated before this Court pursuant to section 145 of the Registered Land Act Cap 58:01 to determine two issues for most.

- (1) It is sought to determine whether the defendant owes the plaintiff any money. (2) If he does whether the defendant's property title No. Nyambadwe 62 is security for that debt. It is only to that extent that the parties seek the intervention of this Court. In other words the parties are not interested in going as far as determining the actual amount, if any, that the defendant owes the plaintiff.

This is a case where I should remind myself of the standard of proof in a civil cause which is proof on a balance of probabilities. This reminder is critical in the nature of the evidence that is before me as I shall soon discuss

but first I should present an overview of the circumstances surrounding the parties.

The short of it is that the defendant Bank says it advanced money to a trading company known as Yeyeye Trading and Transport Company to support the Company in the importation of coffin fittings and tyres of particular concern in this matter is the sum of K2,009,000.00 which the plaintiff claims has not been paid back since it was given to the defendant towards the end of 1996. I will get to the details of this amount and what is said to have been arranged between the parties soonest. It is further the plaintiff's case that property describes as Nyambadwe 62 or NY 13 is security for the amount according to the documents that were exchanged between the parties some of which have been exhibited.

On his part the defendant denies liability and for the most part states that the alleged debt was that of Yeyeye Trading. The defendant's position is that he played very little role in facilitating the debt to the Company and that in any event he did not take part in the operations that followed including how the money was dealt with. It is contended that the man at the centre of the Company was Mr. Tchongwe and that the defendant and Hon. Gwanda Chakuamba were drawn in for their influence as at that time they were high ranking officials of the Malawi Congress Party.

The defendant states that the property No. Nyambadwe 62 or NY 13 was not released to the plaintiff as security of the credit facility given to Yeyeye Trading Company.

This case has given me quite some moments; for the most part because of the nature of the exhibits which are all photocopies where in some instances it has been very difficult for the court to make sense out of them. Unfortunately the matter has been by way of depositions and therefore wholly dependant on affidavits. It seems to me this case would have been heard in Open Court for the deponents of the affidavits to be examined. We did not take that course and therefore have to contend with the procedure we have adopted.

On the 7th October 1996, Yeyeye Trading and Transport Company by Exhibit PG 1 applied to the plaintiff Bank to open an account. The application was supported by a resolution of the Board of Directors of the Company namely, Honourable Gwanda Chakuamba as Chairman, Honourable Doctor H. Ntaba as Secretary and Mr alex Tchongwe as Manager. The Resolution had been adopted the previous day the 6th October 1996 perhaps to mention here that Yeyeye Trading and Transport Company is said to be Limited Company.

On the first of November 1996 by Exhibit PG 6 Mr. Tchongwe, on behalf of Yeyeye, wrote the plaintiff Bank and sought an overdraft. The count sought by that letter was K1,000.000.00 which was intended to secure letters of credit in the amount of K900,674.80. This amount was meant to pay for a consignment of tyres.

Subsequently the plaintiff and the three Directors of Yeyeye engaged in a number of signed agreements towards the overdraft. On the eighth of November, 1996 the defendant with the others completed and signed a

formal application Exhibit “VM 7”. On the same day a Promissory Note was signed where the three directors promised to pay on demand to the plaintiff sums of money received with interest, exhibit “PG 7”. On that same day a Letter of Arrangement was also signed providing for what would happen in the event of cancellation of the facility, exhibit “PG”. Another document was signed but not dated Exhibit “PG3” an “Undertaking to Create Mortgage and Memorandum of Deposit of Title Deeds For Creation of Equitable Mortgage.

There is something very odd about these last three documents. That is why I have said perhaps this matter should have been handed in Open Court to examine the deponents of the affidavits in some instances. Exhibits PG 3 is not dated and contains an amount of K2,009,000.00. Exhibit PG 4 is but the spaces where money should have been entered are blank. Exhibit PG7 is also blank in spaces where the sums of money should have been indicated. All these three documents are introduced by Mr Petro Gomani the plaintiff’s Advances Supervisor. Mr. Gomani’s affidavit however does not explain why the documents are blank in the most critical areas.

Ironically the same documents are brought again through Mr. Viwemi Mzumara the plaintiff’s Assistant Manager Credit Services. Mr. Mzumara does not explain how the same documents which the plaintiff had introduced without any entries now had entries property indicated and the details of the property entered. I note though that both Gomani and Mzumara were not with the Plaintiff’s Bank at the time of these transactions. I can therefore well understand why they could not attempt explain the discrepancy.

In submitting for the plaintiff Messrs Chagwanjira stresses that these three documents are standard official documents which every customer of the plaintiff completes when seeking financial support from the plaintiff. It is submitted that the documents could never have been blank. Counsel's submission could never have been intended to be evidence and therefore cannot explain the serious conflict between the documents of Gmani and those of Mzumara both of them the plaintiff's own employee and therefore must have obtained these documents from the plaintiff's official records.

But there is something else that I should look at which is the affidavit of the defendant. The critical paragraphs are 9,10,11,12,13 and 14. These paragraphs are set out below:

1. Mr Tchongwe had won two Government tenders to supply coffin fittings and motor vehicle tyres to the Controller of Stores. He went to Finance Bank of Malawi for some credit support in the form of an overdraft for Letters of Credit for importation of tyre and coffin fittings as we understood it.
2. The Bank was willing to do so provided that the Controller of Stores undertook to pay direct into an existing account at the Bank, and do so in 20 days after receipt of the goods. I exhibit this deposition copies of letters marked "LL 1", "LL2", "LL3", "LL4", and "LL5" evidencing the above position.
3. The Bank Manager, Mr. Chinthiti, that time (sometime early October, 1996), came to see Hon. Chakuamba and myself, with

Mr. Tchongwe at Balantyre MCP Offices. He asked us to assist in guaranteeing Mr. Tchongwe's overdraft facility for the tender purchases. Hon. Chakuamba and I were approached in this manner as President and Treasurer General of the Malawi Congress Party respectively. The hope was that Mr. Tchongwe would be able to continue to help the Malawi Congress Party using the profits from the transactions for which he was seeking overdraft facilities from the Bank.

4. Upon being shown the written guarantees that the Controller of Stores would pay in 30 days after receipt of goods, and pay direct into a bank account, Hon. Chakuamba and myself agreed to give the guarantee for such a Bank facility. However, this was done on condition that we open a special project account and operate it jointly for these tender transactions and I understood that there must be joint signatures for cheques to draw from this account and for other transactions to ensure appropriate control.
5. Hon. Chakuamba, Mr. Tchongwe and myself, filled the relevant forms for opening the account, which was to be in the name of Yeyeye. However, I have not seen any cheques or statements to show how this account functioned, if it did function at all. I exhibit to this deposition marked "LL6" a copy of the account opening form.

6. Neither Hon. Chakuamba nor myself signed any cheques for this joint account nor did we see any statements of the account. Sometime after the account was opened the Bank Manager aforesaid however said everything was in order. He had already established the Letters of Credit, starting with tyres, followed by the coffin fittings.

What clearly emerges from these paragraphs is that the defendant Honourable Chakwamba and Mr. Tchongwe indeed applied for and an account was opened for them. It was a joint account which was to be operated in accordance with an arrangement among the three.

I have also been looking at the exhibits that were tendered by the defendant. Among them is a letter from the Plaintiff dated 23rd November 1996. This exhibit, coming from the defendant as it does confirm that an overdraft in the sum of K2,000.000.00 was granted to the defendant as of that date. This letter is important because it also states the form of security for the overdraft. This is what it states:

Quote LL 8

On a clear reading of this letter together with what the defendant's affidavit and Exhibit "PG 1, PG 6 and LL 6 confirm to me that an overdraft was granted to facilitate letters of Credit at least to the extent of K2,000,000.00. I will go on and say the security for this overdraft is clearly set out in the plaintiff's letter and does not include property entitled Nyanbadwe 62 or NY 13. This therefore is where the matter was as of the

23rd November 1996 to the extent I can deduce from the documents and from some statements in the affidavits.

The matter however goes further. At paragraph 48 and in response to paragraph 7 of Mr. Gomani's affidavit the defendant states as follows:

“Yes the title documents -----“

What this confirms is that after the first overdraft the parties confirmed discussing further facilities which resulted in the defendants offering property No. NY 13 or Nyambadwe 62. The letter by the defendant is as follows: Eventually a second letter of credit was facilitated, which the plaintiff wrote to Yeyeye Trading and Transport Company about in the letter of 23rd December 1996 exhibit LL 9 also “VM 8”. Again I should set out this letter which is as follows:

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My evaluation of the transaction thus far is that the second letter of credit was attracted by, among other securities, property Number NY 13 or Nyambadwe 62. It is this K1.5 million property mentioned in the defendant's letter which is also referred to as plot No. NY 13, Blantyre said to be worth K1.5 million in the plaintiff's letter. Again I must find that an overdraft was made available to Yeyeye Trading and Transport Company for which the defendant was one of the Directors.

Where does all this discussion place property No. NY 13 or Nyambadwe 62? A quick reaction would be that if this property was not available for the initial overdraft/letter of credit, it was certainly available for the second letter of credit. After all the defendant himself offered the property for that purpose. The quick conclusion seems to be that indeed this property was subject to the second overdraft.

But something in the discussions between the parties would suggest a different conclusion. Both Exhibits “LL 8” and “LL 9” (vm 8) end with the following paragraph:

“Please sign and return a copy of this letter in acknowledgement and acceptance of the terms and conditions expressed herein”.

I have no intention of reading a lot into this paragraph. I have already discarded Exhibits “PG 3”, “PG 4” and “PG 7”. There is no evidence of a signed response to Exhibits “LL 8” or LL 9”. I thought it clear that something needed to be done to complete the transaction which was not done as expressed and expected by the parties. What would I call the written memorandum of the terms of the guarantee in terms of the statute of Frauds 1877. The LETTER OF GUARANTEE, Exhibit “PG 2” is certainly not such guarantee because it does not relate to or make any reference to property NY 13 or Nyambadwe 62.

That LETTER is merely an additional guarantee to any other guarantee the parties might have deemed fit to execute. It certainly does not commit the property in question to the overdraft and or Letter of credit.

I must confess this matter has presented me with a very strange scenario. For the most part it was counsel on both sides attempting as much as they could to fill in gaps in the evidence. The documents tendered on both sides were disorganized and in some cases unhelpful to explaining the sequence of events. As a result it has taken me a great while to find my way through which I have done in the best manner I could possibly do. In the end though and for all that I have said my determination of the matter to the extent required by the parties is as follows:

- (a) That the Defendant does owe the Plaintiff money.
- (b) That property known as Nyambadwe 62 or Plot No. NY 13 is not security for that debt.

The matter is split. It is only fitting that I make an order that each party pays own costs. I accordingly do.

MADE in Chambers at Lilongwe this 11th day of December, 2007.

A.K.C. Nyirenda
J U D G E